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DEPOSITION AND ANSWERS of Frank E. Smith, M.D., called as a witness by the Plaintiff, taken before Jerri Trousdale, Certified Shorthand Reporter in and for the State of Texas, in the law offices of Byrd, Davis & Eisenberg, 707 W. 34th Street, Austin, Texas, on the 7th day of December, 1987, pursuant to notice and the following stipulation and waiver of counsel:

A P P E A R A N C E S

Mr. Don L. Davis, of the law firm of Messrs. Byrd, Davis & Eisenberg, 707 W. 34th Street, Austin, Texas 78705, appearing for the Plaintiff.

Mr. James E. Upshaw and Mr. Tommie Williams, of the law firm of Messrs. Upshaw, Williams, Biggers, Page & Kruger, 309 Fulton Street, Greenwood, Mississippi 38930, appearing for the Defendant, The American Tobacco Company.

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Mr. Thomas E. Bezanson and Mr. Bruce G. Sheffler, of the law firm of Messrs. Chadbourne & Parke, 30 Rockefeller Plaza, New York, New York 10112, appearing for the Defendant, The American Tobacco Company.

ALSO PRESENT: Sally King

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IT IS STIPULATED AND AGREED by and between counsel for the respective parties hereto that the deposition of the witness named in the caption hereto may be taken at this time and place before the officer named in the caption hereto; time and notice being waived, and that the said deposition, or any part thereof, when so taken may be used on the trial of this case with the same force and effect as if the witness were present in court and testifying in person;

THAT all objections except as to the form of the questions shall be reserved to the time of trial.

THAT the original of this deposition shall be presented to the witness for his examination and signing, and thereafter, said witness shall return same to the officer taking this deposition for filing with the Court, and that notice of filing to all parties hereto is waived.

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FRANK E. SMITH, M.D.

was called as a witness by the Plaintiff and, being first duly sworn, testified as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. DAVIS:

Q. Would you state your name, please?

A. Frank Smith.

Q. And what is your occupation, sir?

A. I'm a physician.

Q. Dr. Smith, we just met a few moments --

MR. UPSHAW: Wait just a minute. I did want to even though we discussed it before we started, Don, you have told us that this was noticed earlier somewhere along as a video. I don't recall that and we object to it being taken as a video

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today.
MR. DAVIS: Okay.
MR. UPSHAW: And we are taking it by agreement today in continuance and I don't recall what the notice of the original was, but we see no purpose for it being taken as a video and object to it.

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MR. DAVIS: Your objection is noted.
Q. (By Mr. Davis) Dr. Smith, I represent Ella Horton and children in a suit against American Tobacco Company that's pending in Lexington, Mississippi. You are aware of that I assume?
A. Yes.
Q. Tell me a little bit about yourself. What type of occupation do you follow? What type of work do you do? Give us a little history of your background if you would.
A. I'm an M.D. from 1960 and took internal medicine training following that at Baylor College of Medicine for three years after internship. Two years of medical oncology training following that. So since 1968, I have been on the facilty of Baylor College of Medicine in Houston, departments of internal medicine and pharmacology. So I am a board certified internist and medical oncologist. I have been engaged in medical teaching, basic and clinical research, some degree of administration at the medical school since then. That's basically it, what I have done.
Q. What's a normal day in the life of Frank Smith consist of doing at the school?

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A. Get up about 5:30 in the morning. Do a little paperwork at home. Usually spend the bulk of the day in the hospitals doing bedside teaching, consultations. Part of the day is spent at the Medical School of proper -- reviewing clinical research of one type or another or seeing consultative patients over there or dealing with administration.
Q. What percent of your time would you say is engaged in the oncology practice or oncology teaching?
A. About 95 percent.
Q. You actually do clinical teaching as well as see clinical patients?
A. Yes.
Q. What courses specifically do you teach?
A. I am heavily engaged in teaching the basic pharmacology course for the medical students at Baylor.
Q. Is that what it is called, "Basic Pharmacology"?
A. Uh-huh. Or General Pharmacology is what it is called formally. And I teach in other courses at Baylor including the Introduction to Medicine

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course.
Q. What textbook do you use for that?
A. For the Introduction of Medicine course we don't use any text. We use many different references.
Q. Okay. You don't use the Cecil & Loeb

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|00008-07| standard or anything like that?
|00008-08| A. No. We make our own syllabus. There are
|00008-09| lots of references to standard texts like Cecil &
|00008-10| Loeb, Harrison and so on, but we make our own
|00008-11| syllabus which is heavily drawn upon from the
|00008-12| literature. And there is a clinical oncology course
|00008-13| that I coordinate. It takes place every two years.
|00008-14| There's a cancer prevention course that I participate
|00008-15| in. And those are the major course work
|00008-16| responsibilities that I have.
|00008-17| Q. Okay. Your clinical oncology course you
|00008-18| said meets every two years. I had a little trouble
|00008-19| understanding what you were referring to there.
|00008-20| A. It's an elective course for medical
|00008-21| students.
|00008-22| Q. I see.
|00008-23| A. Who wish to get additional insights into
|00008-24| what clinical oncology is.

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|00009-01| Q. So you offer it every two years and that
|00009-02| way in their three or four year span of their
|00009-03| education they can take it if they desire?
|00009-04| A. Right.
|00009-05| Q. Okay. What is your textbook in that
|00009-06| course?
|00009-07| A. We don't use any specific textbook. We
|00009-08| refer to several different texts. Cancer Medicine is
|00009-09| one by Holland & Frei. Clinical Oncology --
|00009-10| Q. DeVita?
|00009-11| A. DeVita. Uh-huh. And now we use Medical
|00009-12| Oncology Calabresi as the major referenced text.
|00009-13| Q. During the course of your teachings, do
|00009-14| you have occasion to instruct the students on the
|00009-15| type of history they take from the patients?
|00009-16| A. Yes.
|00009-17| Q. What type of things do you ask them to
|00009-18| look for when you have a patient that is on your
|00009-19| pharmacology ward for example?
|00009-20| A. Well, I think the first thing regarding
|00009-21| history taking is directed towards what the patient's
|00009-22| major complaints are, what body systems may be
|00009-23| troubled with disease and the details of being able
|00009-24| to speak with people and elicit medical information

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|00010-01| from them.
|00010-02| Q. Do you talk to them and instruct them on
|00010-03| getting accurate environmental and employment
|00010-04| exposure histories?
|00010-05| A. We instruct them to as part of the -- as
|00010-06| part of the general historical information to obtain
|00010-07| those types of personal history, family history,
|00010-08| occupation --
|00010-09| Q. Do you ask them --
|00010-10| A. -- medicines, so on.
|00010-11| Q. I'm sorry. I interrupted you.
|00010-12| A. Medications, allergic history, past
|00010-13| operations, the usual types of things that one wishes
|00010-14| to elicit for the complete history.
|00010-15| Q. Do you require them to obtain a smoking
|00010-16| history?
|00010-17| A. Yes.
|00010-18| Q. What is the purpose for that?
|00010-19| A. A smoking history is obtained along with
|00010-20| other aspects of history, do they drink, do they take

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any medications, to ascertain whether or not any of their medical history may be attributable on the part of habits, personal habits.

Q. What kind of medical history could be

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attributed to a smoking history?

A. Well, when patients have obviously lung symptoms of any kind.

Q. Such as lung cancer, emphysema?

A. Well, that's -- are we talking about general history now or about --

Q. History of smoking.

A. Okay. Well, if you are talking about history of smoking, one first just elicits whether or not one has any lung symptoms of any kind and whether -- and then later in your history you synthesize some feeling as to whether or not any of the personal habits, including smoking, had anything to do with their medical problems.

Q. Okay. What I want to find out though specifically now is when you are obtaining a history of smoking, what specific conditions would you be looking for that might be caused by that smoking?

A. Well, the associated illnesses of many types including, you know, chronic bronchitis, aggravation of asthmatic bronchitis, associations with lung tumors, aggravation of pulmonary symptoms in patients with heart failures. There are a number of things which, you know, a huge number of diseases

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which can involve the chest, both primary diseases of the lung and diseases not of the lung.

Q. Which are associated with the smoking history?

A. No. In which smoking may aggravate some of the underlying symptoms of the disease.

Q. Okay. Doctor, when was the first time you were contacted about the Nathan Horton case? Do you have any recollection of that?

A. I don't recall a specific date.

Q. A time frame?

A. I think it was earlier this year. In the earlier part of this -- sometime earlier this year.

Q. Do you recall who contacted you?

A. I talked with Mr. Bezanson.

Q. Was it a telephone call?

A. We have had several telephone calls and we have met several times.

Q. Prior to you being asked to do anything in the Nathan Horton case?

A. Yeah. We met before this case.

Q. Are you working for American Tobacco on other cigarette cases?

A. No.

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MR. UPSHAW: I object to that question. It has nothing whatsoever to do with the scope of this deposition.

Q. (By Mr. Davis) Are you working with any other cigarette companies?

A. No.

MR. UPSHAW: I object to that. That doesn't have anything to do with this.

Q. (By Mr. Davis) Is this the only case you

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|00013-10| are working on with regard to cigarette litigation?
|00013-11| A. Yes.
|00013-12| Q. You haven't done anything for anyone else
|00013-13| in any other cigarette litigation that you are aware
|00013-14| of?
|00013-15| MR. UPSHAW: I object to all these
|00013-16| questions. It doesn't have anything to do with this
|00013-17| deposition or this case.
|00013-18| Q. (By Mr. Davis) You may answer now.
|00013-19| A. I can answer?
|00013-20| Q. Yes. He has to make his objections for
|00013-21| the record.
|00013-22| A. I have reviewed several cases in the past
|00013-23| that have to do with litigation involving the
|00013-24| cigarettes.

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|00014-01| Q. Who have you reviewed those for?
|00014-02| MR. UPSHAW: I object to all of these,
|00014-03| Don. It has nothing whatsoever to do with this
|00014-04| deposition and I will instruct him not to answer
|00014-05| that.
|00014-06| MR. DAVIS: Counsel, I assume bias is one
|00014-07| of the areas we are entitled to inquire into and I
|00014-08| think the man's history of working for cigarette
|00014-09| companies is very clearly admissible. You can drive
|00014-10| your own train and if you are going to instruct him
|00014-11| not to answer any of those questions I will have to
|00014-12| live with it, but I think we might be back in front
|00014-13| of the judge.
|00014-14| MR. BENZANSON: Well, there is no bias of
|00014-15| course, but I just want to point out that you had
|00014-16| stopped us from inquiring into your various experts'
|00014-17| activities in other cases.
|00014-18| MR. DAVIS: I don't believe we have.
|00014-19| MR. BEZANSON: Yes, you did. You can't
|00014-20| seek discovery in other cases.
|00014-21| MR. SHEFFLER: Specifically the notes.
|00014-22| MR. UPSHAW: In the deposition if you
|00014-23| recall, Don, that's your objection.
|00014-24| Q. (By Mr. Davis) Doctor, I want to ask you

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|00015-01| have you executed any affidavits for any cigarette
|00015-02| manufacturer in any cigarette-related cases?
|00015-03| MR. UPSHAW: Same objection.
|00015-04| MR. BEZANSON: You can go ahead and
|00015-05| answer.
|00015-06| A. Yes, I have.
|00015-07| Q. (By Mr. Davis) How many?
|00015-08| A. I can't recall. A couple. Two or three
|00015-09| maybe. No more.
|00015-10| Q. Have you reviewed more than two or three
|00015-11| cases in the cigarette litigation type?
|00015-12| A. No.
|00015-13| MR. UPSHAW: We object to this whole line
|00015-14| of questioning.
|00015-15| Q. (By Mr. Davis) What were you told --
|00015-16| what was your relationship with Mr. Bezanson prior to
|00015-17| learning about the Horton case? You said you had met
|00015-18| him on several occasions.
|00015-19| A. He was introduced to me by an attorney
|00015-20| that I know in Houston.
|00015-21| Q. Who is that?
|00015-22| A. Mr. Cruz.
|00015-23| Q. Okay.

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|00015-24| A. And they'd asked whether I would be

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|00016-01| interested in reviewing a case.
|00016-02| Q. Okay.
|00016-03| A. Which I did.
|00016-04| Q. Okay. That was before you had heard
|00016-05| about the Nathan Horton case?
|00016-06| A. Yes.
|00016-07| Q. And was that for American Tobacco also?
|00016-08| A. Yes.
|00016-09| Q. Okay. What kind of discussions have you
|00016-10| had with the -- with Mr. Bezanson concerning Nathan
|00016-11| Horton's case?
|00016-12| A. Well, our discussions have -- stand from
|00016-13| reviewing the medical records of Mr. Horton and their
|00016-14| asking me about details of his medical records and
|00016-15| what my opinions were regarding the nature of his
|00016-16| illness which of course was treatment, diagnosis,
|00016-17| those kinds of questions.
|00016-18| Q. Okay. Tell me specifically, Dr. Smith,
|00016-19| if you would, what have you been provided concerning
|00016-20| Nathan Horton?
|00016-21| A. I have been provided the medical records.
|00016-22| Q. Which medical records? Was this Dr.
|00016-23| Williams, the treating physician, plus the Veterans
|00016-24| Administration records?

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|00017-01| A. There were copies I think from Dr.
|00017-02| Williams. Mainly they were Veterans Administration
|00017-03| Hospital records from Mississippi. They had also
|00017-04| provided me with a copy of the -- eventually of the
|00017-05| autopsy report.
|00017-06| Q. All right, sir.
|00017-07| A. And then later, at my request, they sent
|00017-08| the pathology slides to Houston so I could review
|00017-09| them.
|00017-10| Q. Okay.
|00017-11| A. Those are the only materials I have been
|00017-12| provided.
|00017-13| Q. Okay. What have they told you
|00017-14| specifically about Nathan Horton's life-style, if
|00017-15| anything?
|00017-16| A. Very little.
|00017-17| Q. Just tell us if you would in a nutshell
|00017-18| what you know about his life-style.
|00017-19| A. Well, I know very little about Mr.
|00017-20| Horton's life-style except as it pertains to the
|00017-21| medical records.
|00017-22| Q. Okay. If it's not contained in the
|00017-23| medical records then you wouldn't have any
|00017-24| information as far as you know?

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|00018-01| A. Well, we -- in discussing I have asked
|00018-02| them -- how to phrase this -- I have asked them were
|00018-03| there any particular aspects of his history that
|00018-04| didn't appear in the medical records as to occupation
|00018-05| and so on.
|00018-06| Q. What kind of response did you get?
|00018-07| A. Well, there wasn't -- we did't -- there
|00018-08| wasn't a lot of information beyond what was on the
|00018-09| medical records.
|00018-10| Q. Okay.
|00018-11| A. One piece of information was that he did
|00018-12| work in a foundry which -- for a period of perhaps a

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|00018-13| couple of years. An iron foundry. This, to my
|00018-14| recollection, didn't appear in the medical records.
|00018-15| Q. Anything else?
|00018-16| A. Not that I can recall.
|00018-17| Q. Nothing else that stands out -- nothing
|00018-18| else that stands out of any significance to you at
|00018-19| this time?
|00018-20| A. No.
|00018-21| Q. Does the fact that he worked for a year
|00018-22| or two in an iron foundry in your opinion play any
|00018-23| part in the issues in this case?
|00018-24| A. I can't see that it does, no.

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|00019-01| Q. Okay. Were you given any depositions to
|00019-02| read?
|00019-03| A. No.
|00019-04| Q. Have you been given any summaries of
|00019-05| depositions or any written --
|00019-06| A. No.
|00019-07| Q. -- analysis of the depositions?
|00019-08| A. No depositions, no analysis, no
|00019-09| summaries.
|00019-10| Q. Have you been told what other witnesses
|00019-11| have testified to verbally?
|00019-12| A. I have been told that there have been
|00019-13| some other witnesses. I have been told there was a
|00019-14| deposition taken from a pathologist in Mississippi,
|00019-15| but we haven't discussed any details of that nor have
|00019-16| I reviewed the deposition.
|00019-17| Q. Okay. Who have you met with to discuss
|00019-18| Nathan Horton's case?
|00019-19| A. Well, we have had few meetings, the
|00019-20| gentlemen here.
|00019-21| Q. When were these meetings?
|00019-22| A. Well, there was a meeting in Houston
|00019-23| several months ago.
|00019-24| Q. Who was present there?

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|00020-01| A. All of these gentlemen were here plus
|00020-02| several doctors from Mississippi.
|00020-03| Q. What were the doctors' names?
|00020-04| MR. UPSHAW: Let me refresh his memory
|00020-05| there a little bit. Don, I was not there.
|00020-06| MR. DAVIS: Okay.
|00020-07| A. I'm sorry.
|00020-08| MR. UPSHAW: Tommy Williams from my firm
|00020-09| was there.
|00020-10| A. Yeah. Mr. Williams was there.
|00020-11| Q. (By Mr. Davis) Mr. Williams --
|00020-12| A. Several doctors from Mississippi.
|00020-13| Q. What were their names?
|00020-14| A. I don't remember their names.
|00020-15| Q. Can you remember any of them?
|00020-16| A. No.
|00020-17| Q. And what was the purpose for that
|00020-18| meeting?
|00020-19| A. The general tenure of the meeting was to,
|00020-20| number one, hear some information about the pathology
|00020-21| of lung tumors from Dr. Wheeler who was another
|00020-22| person present there.
|00020-23| Q. Who is Dr. Wheeler?
|00020-24| A. He is a pathologist at Baylor College Of

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|00021-01| Medicine at Methodist Hospital in Houston.

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|00021-02| Q. And what did Dr. Wheeler do?
|00021-03| A. He discussed general aspects of the
|00021-04| pathology of lung tumors.
|00021-05| Q. Okay. What did he use as the format for
|00021-06| that discussion?
|00021-07| A. Well, I wasn't there for the whole
|00021-08| presentation since I was at the hospital all that
|00021-09| morning. It was a Saturday. But he used slide
|00021-10| material and basically the aspects of things that I
|00021-11| saw had to do with kind of a semi-formal academic
|00021-12| presentation and answered questions that the
|00021-13| physicians had about lung tumors.
|00021-14| Q. Was this sort of an educational meeting
|00021-15| for the Mississippi doctors?
|00021-16| A. I don't know that -- what the purpose of
|00021-17| it was because I wasn't there when they stated what
|00021-18| the purpose of the meeting at its inception was since
|00021-19| I was at the hospital making rounds, but obviously he
|00021-20| has a lot more expertise in pathology than any of the
|00021-21| individuals in the room. I mean family
|00021-22| practitioners, radiation therapists, when I arrived,
|00021-23| I'm an oncologist. I know a little pathology, but
|00021-24| I'm not a pathologist. And after that, he answered

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|00022-01| some questions about the pathology of lung tumors. I
|00022-02| got a few questions about the oncologist's role in
|00022-03| diagnosis and identification of lung tumors.
|00022-04| Q. Was Nathan Horton's autopsy discussed at
|00022-05| that meeting?
|00022-06| A. The autopsy -- that's -- I did see the
|00022-07| autopsy report at that meeting.
|00022-08| Q. You saw it for the first time at that
|00022-09| meeting?
|00022-10| A. Yes.
|00022-11| Q. Okay. So it wasn't something that you
|00022-12| had used to prepare your presentation then; is that
|00022-13| correct?
|00022-14| A. No. I didn't have a presentation at that
|00022-15| time, that meeting.
|00022-16| Q. Oh, I thought you said Dr. Wheeler did
|00022-17| the pathology and you did the oncology.
|00022-18| A. Then there were general questions after
|00022-19| that. I gave no official presentation. I wasn't
|00022-20| asked to.
|00022-21| Q. You were just present at the meeting?
|00022-22| A. I was present at the meeting, answered a
|00022-23| few questions.
|00022-24| Q. What was discussed about Nathan Horton's

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|00023-01| autopsy if it was discussed at the meeting?
|00023-02| A. Well, my recollection is that someone
|00023-03| made me aware that the autopsy report was available
|00023-04| and I looked at it and talked about it briefly with
|00023-05| Mr. Bezanson I think.
|00023-06| Q. Okay. Did you talk about it with any of
|00023-07| the other doctors present?
|00023-08| A. No.
|00023-09| Q. With Dr. Wheeler?
|00023-10| A. Not at that meeting, no.
|00023-11| Q. To your knowledge were the slides that
|00023-12| were being used by Dr. Wheeler slides of Nathan
|00023-13| Horton?
|00023-14| A. I think these were slides from his
|00023-15| general teaching file. Well, they had to be from the

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|00023-16| segment of slide information that he presented of
|00023-17| many different types of lung tumors.
|00023-18| Q. Do you recall anything else that occurred
|00023-19| at that meeting?
|00023-20| A. No.
|00023-21| Q. Was there any written material passed out
|00023-22| at that meeting?
|00023-23| A. I didn't receive any written material.
|00023-24| Q. Did you see any being passed around?

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|00024-01| A. I think Dr. Wheeler had some -- I think
|00024-02| some handout material, maybe some reprint material on
|00024-03| lung tumors.
|00024-04| Q. Do you know specifically what it was or
|00024-05| did you get a copy of it?
|00024-06| A. No, I didn't.
|00024-07| Q. Okay.
|00024-08| A. I didn't get a copy of it and I didn't --
|00024-09| I wasn't particularly pressed to review it.
|00024-10| Q. Okay. Now, in addition to that meeting,
|00024-11| what other meetings have you had?
|00024-12| A. I think in all we have met about three
|00024-13| times.
|00024-14| Q. Where was the next meeting?
|00024-15| A. Mr. Sheffler and I and a couple of his
|00024-16| associates had met and --
|00024-17| Q. When was that?
|00024-18| A. I don't recall the precise date of the
|00024-19| first time we met on that.
|00024-20| Q. Was it after this meeting in Houston with
|00024-21| Dr. Wheeler and the other doctors in Mississippi?
|00024-22| A. The first time was before that, wasn't
|00024-23| it? Several -- early in the summer of this year.
|00024-24| Q. Okay. And what was the purpose for that

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|00025-01| meeting?
|00025-02| A. The purpose for, as I recall, for that
|00025-03| meeting was to review certain aspects of Mr. Horton's
|00025-04| medical history and for me to get the medical
|00025-05| history, have a look at it and review it.
|00025-06| Q. This was before you were able to obtain
|00025-07| the autopsy?
|00025-08| A. Yeah. He was still -- this was before
|00025-09| the autopsy.
|00025-10| Q. This was when he was still alive?
|00025-11| A. Yes. I think this was -- when we first
|00025-12| discussed Mr. Horton's case, he was still alive but
|00025-13| died very shortly thereafter.
|00025-14| Q. I think he died in January of this year.
|00025-15| I believe January 27th or 8th if I am not mistaken.
|00025-16| MR. UPSHAW: 27th.
|00025-17| Q. (By Mr. Davis) 27th of this year. So
|00025-18| you probably either met him December, early January
|00025-19| then?
|00025-20| A. Yeah. He was still alive --
|00025-21| Q. Okay.
|00025-22| A. -- at the time, but passed away very
|00025-23| shortly thereafter. Within a month or two is my
|00025-24| recollection.

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|00026-01| Q. Okay. Was anyone else present besides
|00026-02| Mr. Sheffler and attorneys from his office?
|00026-03| A. No.
|00026-04| Q. That's two meetings now. You said there

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|00026-05| were three in all. When was the third meeting?
|00026-06| A. Well, we got together, the individuals in
|00026-07| the room here, about a month ago briefly, but we
|00026-08| talked very little about the Horton case.
|00026-09| Q. What was the purpose for that get
|00026-10| together?
|00026-11| A. Well, they were in Houston and the major
|00026-12| purpose was just to get together and we went to eat
|00026-13| together.
|00026-14| Q. It wasn't a formal business meeting then
|00026-15| in your office, it was more of a social?
|00026-16| A. Oh, no, it was a social.
|00026-17| MR. UPSHAW: It was a dinner meeting at
|00026-18| the Remington Hotel. I have never been in his
|00026-19| office.
|00026-20| Q. (By Mr. Davis) Were any doctors present?
|00026-21| A. No.
|00026-22| Q. You were the only one?
|00026-23| A. That's right.
|00026-24| Q. I didn't many to exclude you by asking

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|00027-01| that, but since I listed that answer.
|00027-02| MR. UPSHAW: That's a tough question,
|00027-03| "Was any doctors present?"
|00027-04| Q. (By Mr. Davis) If I understand you
|00027-05| correctly, the only thing then that you have reviewed
|00027-06| for this case is Dr. Williams' records, his medical
|00027-07| records on Mr. Horton, the VA records from Jackson
|00027-08| VA, the autopsy and the path slides; is that
|00027-09| accurate?
|00027-10| A. Yes.
|00027-11| Q. Have you been provided with -- Mr.
|00027-12| Sheffler seems to be upset with that. Is there
|00027-13| something else?
|00027-14| MR. SHEFFLER: If you -- to make the
|00027-15| record complete here, the records that I think Dr.
|00027-16| Smith testified before, he got the complete records
|00027-17| including the University Hospital records and records
|00027-18| from prior to '82 as well.
|00027-19| MR. DAVIS: Okay.
|00027-20| MR. UPSHAW: Frank's been furnished all
|00027-21| the medical records that have been available.
|00027-22| MR. SHEFFLER: Which you have the same.
|00027-23| MR. UPSHAW: Which you have.
|00027-24| MR. SHEFFLER: I know you are not trying

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|00028-01| to trick him.
|00028-02| MR. DAVIS: No. I was just asking the
|00028-03| information. Thank you.
|00028-04| A. One other thing I did see, excuse me, was
|00028-05| the -- I did see his x-rays.
|00028-06| Q. (By Mr. Davis) Okay. Tell me, based
|00028-07| upon your reviewing this information, what
|00028-08| conclusions have you reached concerning Mr. Horton's
|00028-09| medical problems?
|00028-10| A. Well, Mr. Horton died of a malignancy,
|00028-11| number 1. Number two, there was a considerable delay
|00028-12| in the diagnosis of his malignancy. And there's room
|00028-13| for a certain amount of medical discussion about that
|00028-14| aspect of his medical history.
|00028-15| Q. The delay?
|00028-16| A. And the delay and identification of the
|00028-17| disease since it was some four-and-a-half months
|00028-18| approximately from the time an abnormal chest x-ray

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|00028-19| was noted until a biopsy was obtained, given the
|00028-20| diagnosis of the malignancy. I also had some
|00028-21| questions about the options of treatment that might
|00028-22| have been open to Mr. Horton. Although, it's easy to
|00028-23| be a Monday morning quarterback. Was there
|00028-24| anything --

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|00029-01| Q. Any other general conclusions that you
|00029-02| reached and we'll go back and get into the specifics
|00029-03| that you listed?
|00029-04| A. Those are the general conclusions.
|00029-05| Q. Okay. Let's talk first of all about your
|00029-06| first conclusion and that being that he died of a
|00029-07| malignancy. What specifically are you referring to?
|00029-08| A. Well, the postmortem examination that was
|00029-09| performed verified the antemortem diagnosis of
|00029-10| malignancy involving lung intrathoracic structures
|00029-11| and at least one sight of metastasis below the
|00029-12| diaphragm.
|00029-13| Q. Okay. And when you say a malignancy, are
|00029-14| you saying cancer?
|00029-15| A. Yes.
|00029-16| Q. And what type of cancer was this?
|00029-17| A. The precise type of carcinoma that Mr.
|00029-18| Horton had could have been a lung cancer, could have
|00029-19| arisen in some other area like the mediastinum, but
|00029-20| it appeared to have been a giant cell cancer of the
|00029-21| lung.
|00029-22| Q. Your best opinion then medically speaking
|00029-23| is that it didn't start as a primary sight in some
|00029-24| other part of the body and metastasize to the lung,

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|00030-01| in all probability it was a primary lung cancer?
|00030-02| MR. UPSHAW: Object to the form of that
|00030-03| question.
|00030-04| Q. (By Mr. Davis) Is that correct?
|00030-05| MR. UPSHAW: I think it would be better
|00030-06| if you ask him what his opinion is and let him give
|00030-07| it to you rather than you give it to him and ask him.
|00030-08| MR. DAVIS: Well, that's one of the nice
|00030-09| little things about cross-examination, counsel. I
|00030-10| can ask the questions like I want to.
|00030-11| MR. UPSHAW: And I can object to them.
|00030-12| Go ahead though.
|00030-13| A. Okay. It could have been carcinoma of
|00030-14| the lung. Other carcinomas though can involve the
|00030-15| lung and mimic primary cancer of the lung right down
|00030-16| to biopsy interpretation. For instance, there are
|00030-17| certain tumors of the mediastinum which may mimic
|00030-18| many types of malignancy and if you don't run special
|00030-19| tests on the patient before death or at autopsy you
|00030-20| wouldn't understand what the true underlying cancer
|00030-21| was.
|00030-22| Q. (By Mr. Davis) Do you have a criticism
|00030-23| of the autopsy that was performed?
|00030-24| A. I have no specific criticism of the

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|00031-01| autopsy in a general sense, but I am not a
|00031-02| pathologist.
|00031-03| Q. Okay. Are you -- I am trying to make
|00031-04| certain that I don't miss what you are saying here
|00031-05| and it seems to me like you are saying maybe they
|00031-06| didn't run all the tests you wanted them to run.
|00031-07| A. Well, for instance in some tumors some

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malignancies of the mediastinum that may look and appear externally, radiographically or even on a biopsy like a primary cancer that has arisen from the lung may in fact make certain substances which can be measured in blood or stain for on biopsy of the tumor. For instance, for embryonal cell malignancies of the mediastinum one can do special stains on autopsy tissue or on tissue obtained during life and this wasn't obtained in the case of Mr. Horton. These are very treatable tumors.

Q. Do you think Mr. Horton's tumor was treated?

A. I think there was a big time lapse between the identification of the major problem in Mr. Horton's chest and the diagnosis of a malignancy in the chest. It's about four-and-a-half months. That's a long time.

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Q. Do you think it made any difference at all in the outcome of the case?

A. I think it surely could.

Q. Are you faulting Dr. Williams' treatment of Mr. Horton?

A. I'm not faulting anybody.

MR. SHEFFLER: Wait a minute.

Q. (By Mr. Davis) Are you being critical of any specific treatment provided by Dr. Williams to Nathan Horton?

MR. UPSHAW: First place, I object to that because there's no evidence in this record that Dr. Williams treated him nor diagnosed him as having lung cancer. Williams referred him and the treatment was from the VA doctors.

Q. (By Mr. Davis) Okay. Do you have a specific complaint or criticism of the VA doctors' treatment of Mr. Horton?

A. Well, number 1, which was the lung lapse between the identification of a major intrathoracic problem to the actual histologic diagnosis of a malignancy in the chest. Secondly, there's at least room for academic discussion about the approach to treatment that Mr. Horton had. For instance, there

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is in the medical record there a history of a tumor conference being held at which Mr. Horton's case was discussed and he was felt not to be a surgical candidate for treatment and/or for other elements of diagnosis that can be achieved at the same time as the thoracotomy is performed. Presumably because the tumor was close into the mediastinum and because of the size of it. What that does though is eliminates a small subset of patients who may indeed be operable and then may have radiation therapy following if the tumors are limited to the chest.

Q. Okay. Let's, if I may, sort of direct you for just a moment, Dr. Smith, outside of an academic interest. In your opinion, based upon reasonable medical probability, was Nathan Horton's cancer operable?

MR. UPSHAW: Object to the form of the question.

A. I don't know if it was or not because the opinion of the doctors of some was that it was not so he wasn't operated on.

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|00033-22| Q. (By Mr. Davis) You are not going to
|00033-23| second guess that opinion, is that what you are
|00033-24| saying?

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|00034-01| A. I'm saying that in simple I wouldn't
|00034-02| presume to be able to be a defendant of authority on
|00034-03| Mr. Horton or anyone else if I really didn't have the
|00034-04| opportunity to, you know, to examine during life and
|00034-05| to debate the issues at the time rather than looking
|00034-06| back over the record. All I am saying is that there
|00034-07| was room to consider other directions of treatment.
|00034-08| Q. Okay. Fair enough. You are simply
|00034-09| saying then, if I understand you, that you are not
|00034-10| going to second guess what they did. You weren't
|00034-11| there, you didn't have the hands on with the patient,
|00034-12| but looking at the records you can raise some
|00034-13| academic questions or clinical questions about the
|00034-14| course of treatment that was employed?
|00034-15| A. Yes.
|00034-16| MR. UPSHAW: Object to the form of the
|00034-17| question.
|00034-18| Q. (By Mr. Davis) Okay. And by the same
|00034-19| token, am I correct that those questions you are
|00034-20| raising do not and cannot tell us if his course would
|00034-21| have been any different than it actually was had they
|00034-22| been used?
|00034-23| MR. UPSHAW: I object to the form of it.
|00034-24| A. Can I answer that? No. There isn't a

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|00035-01| power on earth that could speculate as to how Mr.
|00035-02| Horton might have done with any other form of
|00035-03| treatment.
|00035-04| Q. (By Mr. Davis) Okay. We have been
|00035-05| discussing here for a moment the four-and-a-half
|00035-06| months delay and the options which you could raise
|00035-07| concerning treatment. Is there anything anymore
|00035-08| specific that we should discuss about that so that I
|00035-09| am fully aware of your opinions in that area?
|00035-10| A. Well, not that's going to make any
|00035-11| difference to Mr. Horton.
|00035-12| Q. Okay.
|00035-13| A. Unfortunately. The big thing that
|00035-14| bothers me is the duration of the time between
|00035-15| recognition of a major problem and an actual proof of
|00035-16| a serious intrathoracic malignancy.
|00035-17| Q. Okay. You have seen, I would guess,
|00035-18| photographs of the size of that tumor, have you not,
|00035-19| that were taken at autopsy?
|00035-20| A. No.
|00035-21| Q. Let me show you --
|00035-22| A. I saw an autopsy report of the
|00035-23| descriptions.
|00035-24| Q. Okay. Let me show you some pictures of

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|00036-01| the tumor. These are marked, doctor, Plaintiffs
|00036-02| Exhibits 15 through 19 and I'll represent to you
|00036-03| these were the pictures taken by Dr. O'Neil.
|00036-04| MR. SHEFFLER: They were taken not by Dr.
|00036-05| O'Neil. His testimony is that they were taken by the
|00036-06| VA photographer at the time.
|00036-07| Q. (By Mr. Davis) Oh, okay. At the time of
|00036-08| the autopsy. And exhibit 15 which I am showing you
|00036-09| is a gross picture with the chest opened up. 16
|00036-10| through 19, doctor, are pictures of the tumor with

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|00036-11| some sectioning done. Doctor, is this the first time
|00036-12| you have had an opportunity to see these photographs?
|00036-13| A. Yes, it is.
|00036-14| Q. From those photographs and your review of
|00036-15| the medical records and history of Mr. Horton, can
|00036-16| you give us a time period over which this tumor would
|00036-17| have grown to this size?
|00036-18| A. You can't make any accurate statement
|00036-19| retrospectively about the growth patterns of tumors.
|00036-20| Q. Are they erratic?
|00036-21| A. They are somewhat erratic. The only way
|00036-22| you could be precise about that would have been had a
|00036-23| piece of Mr. Horton's lung been put in tissue culture
|00036-24| and its actual replication times measured, then one

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|00037-01| could back date and approximate as to when the first
|00037-02| cell became malignant. Beyond that, it's speculative
|00037-03| as to how long he had the tumor. Perhaps, though,
|00037-04| you know, some period of time. Usually the rough
|00037-05| estimates are that a tumor has been present for often
|00037-06| times several years before it's detected clinically.
|00037-07| That's for any kind of tumor.
|00037-08| Q. Okay. So the point is irrespective of
|00037-09| the period of time involved, we are not talking about
|00037-10| a few days or a few weeks or a couple of months, we
|00037-11| are talking about years?
|00037-12| A. With one distinction. Perhaps I should
|00037-13| amplify what I have said a little more. My statement
|00037-14| having to do with measuring the actual doubling times
|00037-15| or the replication times of the tumors from the first
|00037-16| time that a tumor cell became malignant reflects a
|00037-17| period of several years for most tumors.
|00037-18| Q. Okay.
|00037-19| A. We don't have the capacity diagnostically
|00037-20| with any physical examination, history, blood work,
|00037-21| x-rays to pick up malignancies at that point. In
|00037-22| fact, you can't even see a cancer until you have one
|00037-23| times ten to the ninth cell. So that makes up an
|00037-24| English pea-size tumor that you could pick up on a

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|00038-01| chest x-ray.
|00038-02| Q. And that's a lot of time to grow to that
|00038-03| point; correct?
|00038-04| A. That's right. Now, if you identify the
|00038-05| situation then you may still have a potentially
|00038-06| curable situation for many tumors, but the tumor has
|00038-07| been present counting those symptoms and gradually
|00038-08| replicating itself during that preceding interval of
|00038-09| several years.
|00038-10| Q. What are the parameters on cell
|00038-11| replication times? And I am asking you as a layman
|00038-12| when a cell begins to replicate and let's say going
|00038-13| from the pea-size tumor which you described up to
|00038-14| something like this about the size of a softball are
|00038-15| the parameters one to two years to ten to fifteen or
|00038-16| is it tighter than that, is it -- are there any
|00038-17| ballpark parameters of what can occur?
|00038-18| A. Yes, there are. For instance, on the
|00038-19| average leukemic cell population if you culture that
|00038-20| on an -- if you look at the bone marrow on a leukemic
|00038-21| person, the average doubling time of that is about
|00038-22| three weeks. For certain embryonal cancers of the
|00038-23| mediastinum it's as little as ten days. For breast
|00038-24| cancer it's an average period of about 90 days. For

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|00039-01| lung cancer it can vary anywhere from ten days to
|00039-02| ninety, a hundred days. So that the aggressiveness
|00039-03| of lung cancer can be triply variable, rapid like in
|00039-04| the kinds like a small cell cancer say eight, ten
|00039-05| days to being much longer. Three months for instance
|00039-06| with small cell cancers, adenocarcinoma, that type of
|00039-07| thing; but each tumor has its own autonomous
|00039-08| independent growth rate. That's what characterizes
|00039-09| them is that their growth rates are independently
|00039-10| determined by factors that we don't understand and
|00039-11| that's why they are not predictable.
|00039-12| Q. Okay. It's simply impossible for us to
|00039-13| sit here today or for you to go back to your office
|00039-14| and calculate the amount of time at which this tumor
|00039-15| was a certain size as opposed to another time when it
|00039-16| was a certain size on down to when it began?
|00039-17| A. That's correct. All I know is that by
|00039-18| the time those pictures were taken, that the tumor
|00039-19| burden was approximately one times ten to the 13th to
|00039-20| the 14th power because that's the tumor burden that's
|00039-21| lethal to the human, whether it's leukemia, embryonal
|00039-22| cell cancer, breast cancer, colon cancer. Just a
|00039-23| variability of the time that it gets to that tumor
|00039-24| burden and that's the thing that we have been talking

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|00040-01| about.
|00040-02| Q. You are using in a medical sense a word
|00040-03| that I am not familiar with when you say "tumor
|00040-04| burden." Are you simply saying this is what caused
|00040-05| the man ultimately?
|00040-06| A. Tumor burden is just a term that's used
|00040-07| by many physicians which means basically the quantity
|00040-08| of tumor that is present in the patient from head to
|00040-09| foot.
|00040-10| Q. Okay.
|00040-11| A. So it's the tumor load or the tumor
|00040-12| burden. That amount of tumor that a patient is
|00040-13| physically having present in his body.
|00040-14| Q. Okay. You stated that your first
|00040-15| conclusion was that Mr. Horton died of a malignancy.
|00040-16| The malignancy, of course, you are referring to is
|00040-17| the cancer which could have been a lung cancer; is
|00040-18| that correct?
|00040-19| A. Could have been a lung cancer.
|00040-20| Q. Okay. What other kind of cancers do you
|00040-21| believe it could have been?
|00040-22| A. It's possible that a malignancy arising
|00040-23| in the mediastinum mimicking lung cancer might have
|00040-24| been the responsible situation here for Mr. Horton's

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|00041-01| death. One sees many times that one cancer mimics
|00041-02| another on x-rays or even as far down as the actual
|00041-03| histologic interpretation of tumor cells.
|00041-04| Q. Okay. Any other type of cancer that you
|00041-05| think this could have been?
|00041-06| A. From the autopsy report and from some
|00041-07| studies that were done prior to Mr. Horton's death
|00041-08| during his various hospitalizations, there are --
|00041-09| there are no other predominate areas of primary
|00041-10| origin that come to mind. Yet one deposition of
|00041-11| tumor below the diaphragm is my recollection from the
|00041-12| post -- from the autopsy report. And occasionally
|00041-13| small primaries -- small primary malignancies

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|00041-14| disseminate to other areas of the body and masquerade
|00041-15| there as primary tumors of that area. So cancer of
|00041-16| the adrenal to the lung, a person may interpret it as
|00041-17| the first blotch as being a primary cancer arising
|00041-18| from the lung when in fact it came from the adrenal
|00041-19| gland.
|00041-20| Q. Other than the academic inquiry that you
|00041-21| are making, do you know of any other actual evidence
|00041-22| that exists in this case, in the autopsy or the
|00041-23| medical records, that indicates that this cancer came
|00041-24| from some other part of the body?
---------- PAGE00042 --------
|00042-01| A. Well, as I mentioned earlier, if certain
|00042-02| tests weren't done which could have ruled out rare
|00042-03| tumors which are quite treatable like embryonal cell
|00042-04| tumors of the mediastinum.
|00042-05| Q. Let me cut you off if I may. You are
|00042-06| saying certain tests weren't done which could have
|00042-07| ruled out. My question is the positive question. Do
|00042-08| you know of any evidence in his records or in the
|00042-09| autopsy that suggests that this cancer spread from
|00042-10| some other part of the body to the lung?
|00042-11| A. Well, the mediastinum is part of the
|00042-12| thoracic cavity and there are lots of anatomic
|00042-13| structures, lots of different tissues there that can
|00042-14| involve the lung when malignant change takes place.
|00042-15| And in that sense there can be direct spread from the
|00042-16| middle part of the chest to the lung and vice versa.
|00042-17| Now these types of malignancies are less frequent,
|00042-18| but their treatment patterns are very different than
|00042-19| those of each individual type of lung cancer. That's
|00042-20| why it's so important to identify them as early as
|00042-21| possible and to be complete in your diagnostic
|00042-22| evaluations.
|00042-23| Q. Okay. What evidence exists in these
|00042-24| records that suggests to you that Mr. Horton's cancer
---------- PAGE00043 --------
|00043-01| was anything other than a primary lung cancer? I'm
|00043-02| not talking about your academic inquiries, which I
|00043-03| understand. I am asking you what evidence is there
|00043-04| that you are aware of that points it to another
|00043-05| direction?
|00043-06| A. Well, in the records that are available
|00043-07| there wasn't even a complete inquiry into a primary
|00043-08| cancer of the lung let alone in the inquiry as far as
|00043-09| potential origins of the tumor elsewhere wasn't bad,
|00043-10| but it wasn't complete.
|00043-11| Q. Okay. Are you simply saying you don't
|00043-12| know of any other evidence other than it was primary
|00043-13| lung cancer simply because some tests weren't done?
|00043-14| A. I am saying his evaluation was not bad,
|00043-15| but it was incomplete. So that certainly primary
|00043-16| consideration would have to be of carcinoma of the
|00043-17| lung, but the possibility also exists that it might
|00043-18| have arisen from some other area but there isn't any
|00043-19| other information on the chart --
|00043-20| Q. Okay.
|00043-21| A. -- that suggests that.
|00043-22| Q. What you are saying is that as an
|00043-23| oncologist, you know that cancers originate in other
|00043-24| parts of the body and spread to the lung and mimic a
---------- PAGE00044 --------
|00044-01| lung cancer; correct?
|00044-02| A. Yes.

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|00044-03| Q. Based on the information provided to you,
|00044-04| there simply isn't any evidence that this cancer
|00044-05| started in another part of the body and spread to the
|00044-06| lung?
|00044-07| MR. UPSHAW: I am going to object until
|00044-08| you say in what he is saying it on.
|00044-09| Q. (By Mr. Davis) Is that correct?
|00044-10| A. Well, there are other things that may
|00044-11| pertain here. For instance, on Mr. Horton's initial
|00044-12| evaluation if one suspected a lung cancer that was
|00044-13| close into the middle part of the chest, okay, to the
|00044-14| mediastinum, one would think that the chances of
|00044-15| seeing a tumor and getting a biopsy microscopically
|00044-16| or sputum cytology that was positive was very high.
|00044-17| Either of those, either visualize the tumor, biopsies
|00044-18| or sputum cytology. Bronchoscopic washings at that
|00044-19| time didn't show cancer at all.
|00044-20| Q. The biopsy didn't show cancer?
|00044-21| A. No, not of his bronchoscopy. His
|00044-22| diagnosis was made in February by a percutaneous
|00044-23| needle with cat scan control, not by bronchoscopy.
|00044-24| Now, at post with the pictures that you showed, there

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|00045-01| was a tumor involving the bronchus in the left lung.
|00045-02| However, here again, mother nature throws the red
|00045-03| herring at you that most of the time when you see a
|00045-04| tumor arising from the bronchus, that means that that
|00045-05| tumor began there. However, tumors from other areas
|00045-06| can go to the lung and metastasize to the bronchus.
|00045-07| Like with breast cancer this is quite frequent. I
|00045-08| have written up a case with cervical cancer in a
|00045-09| female. Lipomas, melanomas all have the capacity to
|00045-10| do this. So that one would have anticipated with an
|00045-11| easy diagnosis of lung cancer at the time of his
|00045-12| bronchoscopy one would have seen it, one would have
|00045-13| something biopsiable or one would have positive
|00045-14| microscopic washings. That isn't always the case,
|00045-15| but it was in Mr. Horton's.
|00045-16| Q. What is the significance of that?
|00045-17| A. Well, the significance of that is that
|00045-18| earlier in the course of his disease when he was
|00045-19| being evaluated with bronchoscopy with the intent of
|00045-20| the physicians to make a diagnosis, no tumor was seen
|00045-21| in that part of the bronchus that's -- which is
|00045-22| involved with tumor in your photographs of postmortem
|00045-23| material.
|00045-24| Q. Is the tumor inside or outside the

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|00046-01| bronchus?
|00046-02| A. The tumor looks like it's inside in the
|00046-03| wall of the bronchus and in the lumina of the
|00046-04| bronchus too on the postmortem pictures.
|00046-05| Q. Okay.
|00046-06| A. But in this same area which is readily
|00046-07| seen at the time of the bronchoscopy several months
|00046-08| before it wasn't noted.
|00046-09| Q. Okay. Do you have those medical records
|00046-10| with you?
|00046-11| A. No, I don't.
|00046-12| Q. You didn't bring any of your file with
|00046-13| you today?
|00046-14| A. No.
|00046-15| Q. Okay. Have you made any notes in the
|00046-16| medical records to flag particular areas that are of

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|00046-17| interest to you?
|00046-18| A. What I made was a series of notes of my
|00046-19| own with the -- from the medical records --
|00046-20| Q. Okay.
|00046-21| A. -- of Mr. Horton's various
|00046-22| hospitalizations. And I noted periodically the page
|00046-23| numbers of the medical records.
|00046-24| Q. Okay. I am going to ask the court
---------- PAGE00047 --------
|00047-01| reporter to leave a blank at this place in your
|00047-02| deposition and when you get it to review I am going
|00047-03| to ask that you attach a xerox copy, if you would, of
|00047-04| those notes to your deposition. Would you do that?
|00047-05| A. Sure.
|00047-06| Q. Now, back to the tumor itself, do you
|00047-07| have an opinion or have you formed an opinion as to
|00047-08| the histology of the tumor?
|00047-09| A. It appears that the malignancy is a giant
|00047-10| cell carcinoma.
|00047-11| Q. And on what do you base that conclusion?
|00047-12| A. Mainly on the review of the slides with
|00047-13| Dr. Wheeler.
|00047-14| Q. Is Dr. Wheeler someone that has been
|00047-15| employed by American Tobacco in this case that you
|00047-16| know of?
|00047-17| A. I don't know to what degree his
|00047-18| association with American Tobacco is.
|00047-19| Q. At any rate, you are relying on what he
|00047-20| told you about it for that opinion?
|00047-21| A. Right. He's a pathologist that I
|00047-22| frequently rely on when I have any question regarding
|00047-23| a current patient because we see lots of patients
|00047-24| from outside of Houston.
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|00048-01| Q. Would it be a correct conclusion, and I'm
|00048-02| not meaning this in any derogatory sense, that Frank
|00048-03| Smith doesn't have the expertise to review slides and
|00048-04| come up with a diagnosis without enlisting the
|00048-05| assistance of Dr. Wheeler in a case such as this?
|00048-06| A. That would be medically fool-hearted
|00048-07| because I'm not a pathologist, but I review all the
|00048-08| pathology on every patient that I see. That's just
|00048-09| my practice.
|00048-10| Q. Okay. Am I correct though that you are
|00048-11| relying on Dr. Wheeler's conclusion about being giant
|00048-12| cell for you to make that statement?
|00048-13| A. Yes.
|00048-14| Q. Independently, you would not be
|00048-15| comfortable making that conclusion from a review of
|00048-16| the slides?
|00048-17| A. I don't have the degree of expertise that
|00048-18| Dr. Wheeler has or any other certified pathologist.
|00048-19| I know a lot about pathology, but no one would hire
|00048-20| me in any hospital lab to review the slides.
|00048-21| Q. They wouldn't hire me either.
|00048-22| A. Yeah.
|00048-23| Q. I have from the Veterans' records the
|00048-24| pictures which we have used in other depositions of
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|00049-01| the slides. I am not going to burden you if you
|00049-02| would just tell me if you are not capable of doing
|00049-03| this. If I ask you to look at these, could you show
|00049-04| me the specific things in the slides that in fact led
|00049-05| you to the conclusion of the giant cell?

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|00049-06| MR. SHEFFLER: Can we hold on a minute?
|00049-07| MR. UPSHAW: Off the record.
|00049-08| MR. DAVIS: On the record.
|00049-09| MR. SHEFFLER: All right. Unless you are
|00049-10| going to represent to him that there is tumor in
|00049-11| there or those slides came from Nathan Horton's
|00049-12| tumor, what are you trying to do here? If you are
|00049-13| asking him to represent to you what the
|00049-14| characteristics in those pictures are, he's just
|00049-15| testified that he's not a pathologist. Are you going
|00049-16| to tell him that that's from Nathan Horton's tumor?
|00049-17| MR. DAVIS: Yes, I am.
|00049-18| MR. SHEFFLER: All of those pictures?
|00049-19| MR. DAVIS: Yes.
|00049-20| MR. SHEFFLER: That's a
|00049-21| mischaracterization.
|00049-22| MR. DAVIS: These aren't from Nathan
|00049-23| Horton's?
|00049-24| MR. SHEFFLER: Those are from Nathan
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|00050-01| Horton's tumor?
|00050-02| MR. DAVIS: They are not?
|00050-03| MR. SHEFFLER: They certainly are not.
|00050-04| MR. DAVIS: What are they from?
|00050-05| MR. SHEFFLER: Well, this right here is
|00050-06| granuloma.
|00050-07| MR. DAVIS: Okay.
|00050-08| MR. SHEFFLER: Is that from his tumor?
|00050-09| MR. DAVIS: That's number 21.
|00050-10| MR. SHEFFLER: And this is a bronchus,
|00050-11| isn't it? This is cartilage, is it not?
|00050-12| MR. DAVIS: Number 20.
|00050-13| MR. SHEFFLER: Is there any tumor in that
|00050-14| picture?
|00050-15| MR. DAVIS: Okay.
|00050-16| MR. SHEFFLER: Is there?
|00050-17| MR. DAVIS: I don't know. I'm not the --
|00050-18| MR. SHEFFLER: Are you going to represent
|00050-19| to him that that's a tumor?
|00050-20| MR. DAVIS: No. I'm going to represent
|00050-21| to him that these are slides from Nathan Horton's
|00050-22| tissue.
|00050-23| MR. SHEFFLER: Well, that's not what you
|00050-24| originally characterized them as.
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|00051-01| MR. DAVIS: Well, I'm not a very good
|00051-02| lawyer so I just stumble my way through and I'll do
|00051-03| the best I can.
|00051-04| Q. (By Mr. Davis) Doctor, I am going to
|00051-05| show you what's marked exhibit 20, 21, 22 and 23.
|00051-06| Can you tell me if there is or can you tell me if you
|00051-07| have the ability to look at those and tell me what
|00051-08| type of cells are present?
|00051-09| A. No, that's in the realm of a pathologist.
|00051-10| Q. Okay. Whether or not I was giving you
|00051-11| specific slides of what the American Tobacco Company
|00051-12| calls knot tumor or epithelial or whatever, that
|00051-13| wouldn't be an area where you would like to comment
|00051-14| on what kinds of cells are present?
|00051-15| A. No. I could make some comment, but I am
|00051-16| not an expert on histologic interpretation.
|00051-17| Q. Okay. To be completely fair with me, is
|00051-18| there any interpretation you can make from any of
|00051-19| those exhibits?

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|00051-20| A. Well, I could I suppose.
|00051-21| Q. Tell me what you see.
|00051-22| A. But I'm not a pathologist.
|00051-23| MR. UPSHAW: I can object to these
|00051-24| questions. Just a minute off the record. I want to
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|00052-01| go off the record.
|00052-02| (WHEREUPON, a brief recess was taken.)
|00052-03| Q. (By Mr. Davis) Dr. Smith, before we took
|00052-04| a break I had handed you one, two, three, four
|00052-05| photographs that appeared. Would you refer to the
|00052-06| first photograph that you have near you. Identify
|00052-07| the number and tell me what is represented on that
|00052-08| photograph if you can.
|00052-09| A. This is Plaintiffs Exhibit 21 and the
|00052-10| major portion of the photo micrograph is that of a
|00052-11| granuloma which is a non-specific old inflammatory
|00052-12| reaction. Can't say where it's from precisely from
|00052-13| this except to say it could be lung. Looks like
|00052-14| there is anthracotic pigment in some of the cells
|00052-15| over here. It's the type of thing that one sees with
|00052-16| burned out tuberculosis. And, of course,
|00052-17| turberculosis of the lung annotates lung cancer,
|00052-18| sometimes so called scar carcinoma. That's all I
|00052-19| see.
|00052-20| Q. Okay. If you would refer to the next one
|00052-21| and tell us what you see in that photograph.
|00052-22| A. This is Plaintiffs Exhibit 20.
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|00053-01| Q. 20?
|00053-02| A. 20. And on the righthand side of the
|00053-03| photo micrograph is cartilage and then rather solid
|00053-04| tissue on the lefthand side of the slide which looks
|00053-05| like malignancy. There are various size cells. Some
|00053-06| quite large grouped together.
|00053-07| Q. Again, without being critical and none is
|00053-08| intended, are you able to identify the type of cells
|00053-09| present there?
|00053-10| A. Well, certain cells here look very large
|00053-11| like giant cells. Like here, here, here.
|00053-12| Q. Would you take this pen or excuse me,
|00053-13| this pencil, and simply draw an arrow to those cells
|00053-14| that you believe exhibit giant cell characteristics?
|00053-15| A. And in some areas one has the impression
|00053-16| that although overall this is very poorly
|00053-17| differentiated, there is an attempt of a tumor to
|00053-18| make glands at least in one area.
|00053-19| Q. Showing evidence of adenocarcinoma?
|00053-20| A. That's one area that's a little
|00053-21| suggestive of adenocarcinoma.
|00053-22| Q. Would you just take that pencil and draw
|00053-23| a circle around that area?
|00053-24| Okay.
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|00054-01| A. And that's all I see there.
|00054-02| Q. All right, sir. If you would take the
|00054-03| next one and refer to it, please.
|00054-04| A. This is exhibit 22 and this is -- looks
|00054-05| like a section of lung. There are some cells which
|00054-06| appear to be darkly stained maybe with anthracotic
|00054-07| pigment. Some areas of tumor probably poorly
|00054-08| differentiated. Blood vessel at the bottom part of
|00054-09| this.
|00054-10| Q. Can you do any cell typing off of that

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|00054-11| exhibit?
|00054-12| A. No.
|00054-13| Q. Anything else of significance that you
|00054-14| see?
|00054-15| A. Some intraluminal bronchial material in
|00054-16| the bronchus that's been transected here, but the
|00054-17| cellular detail I can't make out. Maybe a
|00054-18| pathologist could.
|00054-19| Q. Okay. And is there one more left?
|00054-20| Identify that if you would, please.
|00054-21| A. Exhibit 23. I don't know where this was
|00054-22| taken from, but there appears to be in the bottom
|00054-23| portion of the slide some poorly differentiated
|00054-24| possibly malignant tissue.

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|00055-01| Q. Does that have many characteristics of
|00055-02| adenocarcinoma?
|00055-03| A. Not to my interpretation. Well, there's
|00055-04| one area down here.
|00055-05| Q. You want to circle it? Glandular
|00055-06| appearance?
|00055-07| A. It's really stretching it, but it's
|00055-08| possible. It's very poorly differentiated.
|00055-09| Q. The best word that I -- you seem to use
|00055-10| to describe this is, whatever it is, is poorly
|00055-11| differentiated?
|00055-12| A. Well, on one there are what appear to be
|00055-13| some giant cells and there is an attempt in a couple
|00055-14| of areas of malignancy to make glands or appear like
|00055-15| an adenocarcinoma does, but it certainly isn't the
|00055-16| typical that one sees with an adenocarcinoma.
|00055-17| Q. Okay.
|00055-18| MR. DAVIS: For you gentlemen's
|00055-19| information, these are going to be the exhibits that
|00055-20| I give you anyway this Friday or next Friday,
|00055-21| whenever it is, and you'll see his markings on then
|00055-22| when you get them. These are the ones you actually
|00055-23| are going to get so I wasn't going to attach them to
|00055-24| the deposition unless you want me to make copies and

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|00056-01| attach them, which we will be happy to do. We'll
|00056-02| xerox them right here.
|00056-03| MR. UPSHAW: Why don't you do that.
|00056-04| MR. BEZANSON: Why don't you do that for
|00056-05| orderliness then.
|00056-06| MR. DAVIS: Okay. I'll also have the
|00056-07| copies of the tumor done. Xerox them and then you'll
|00056-08| have those copies.
|00056-09| Q. (By Mr. Davis) How many times have you
|00056-10| discussed this case with Dr. Wheeler?
|00056-11| A. Twice. Most recently was when he
|00056-12| reviewed the slide material on Mr. Horton on a
|00056-13| teaching scope.
|00056-14| Q. What is teaching scope?
|00056-15| A. Well, a teaching scope is where he
|00056-16| manipulates the slides on the microscope and there is
|00056-17| an arm, an extension arm, on the microscope with a
|00056-18| separate eye piece so that you can both be seeing the
|00056-19| same thing at the same time.
|00056-20| Q. Okay.
|00056-21| A. And prior to that, sometime ago, I can't
|00056-22| remember the precise date, we had discussed his
|00056-23| opinions about the pathology examinations of Mr.
|00056-24| Horton but we hadn't -- he didn't have the slide

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then. We just discussed them very briefly as to what his opinion of the diagnosis was.

Q. Okay. What is your opinion based on reasonable medical probability as to what type of tumor this is in Mr. Horton or was, excuse me?

A. Histologically and clinically it could fit with a giant cell carcinoma of the lung.

Q. Could it also be a poorly differentiated adenocarcinoma of the lung?

A. Well, it's a very poorly differentiated tumor. There are areas and there were areas of the other slides that Dr. Wheeler and I reviewed that looked like the tumor was attempting glandular formation, but there was no question about the fact that they were giant cells, that these giant cells were phagocytizing or eating other cells which is a feature of a giant cell of cancer. And these features have been described before in giant-celled cancer pathology. So he convinced me, from reviewing the slide material, that it was a giant cell carcinoma.

Q. Okay. Would you say that medical opinion could differ in reviewing these slides, one saying it would probably be called a poorly differentiated

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adenocarcinoma and another saying it could probably be described as a giant cell tumor?

A. Well, there's disagreement between pathologists and oncologists all the time.

Q. I realize that, but I am just saying could they reasonably differ?

A. Yes, they could differ. Yes.

Q. Okay. Where in your opinion did the cancer originate?

A. Well, most closely resembles on the biopsy the giant cell carcinoma of the lung to me. Poor differentation.

Q. It originated in the lung then in your opinion?

A. That's the most likely sight of origin of this giant cell tumor.

Q. Okay. You know of no specific evidence that shows you that this tumor of this cancer originated somewhere else and spread to the lung?

A. No, I don't.

Q. Okay. We talked earlier about the delay in time. If a puncture needle biopsy would have been performed say in September or August the year before it was actually done in February I believe, wasn't

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it?

A. Yes, it was.

Q. What would you have expected as a doctor? Knowing now what you know, what would you have expected would have been found?

A. The needle was placed into the sight of tumor, then one would have had a diagnosis at that time and then the question of treatment might have been addressed several months earlier. Occasionally, of course, that's unrevealing. In a negative bronchoscopy even with cat scan control and percutaneous lung biopsy you can usually localize the needle quite well, but it's not unusual to miss a

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http://legacy.library.ucsf.edu/tid/qnp75a00/pdf industrydocuments.ucsf.edu/docs/mgl0001

|00059-14| tumor by a couple of millimeters and then if a person
|00059-15| has an operation to find a tumor right adjacent to
|00059-16| where a biopsy had been attempted. So my opinion is
|00059-17| there that some kind of more aggressive diagnostic
|00059-18| approach would have been in order. So that any
|00059-19| adjustments in treatment that could be offered which
|00059-20| would give the patient a more
|00059-21| outlook -- a better outlook might have been addressed
|00059-22| in October rather than February of the following
|00059-23| year.
|00059-24| Q. The different treatments of choice I

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|00060-01| assume would have been radiation therapy, which he
|00060-02| was ultimately given, down to resectioning the lung
|00060-03| which of course did not occur. Is there anything
|00060-04| else that the doctors would have had to offer Mr.
|00060-05| Horton?
|00060-06| A. The best offer that he could have had
|00060-07| would have been a potential surgical resection.
|00060-08| Either a lobectomy or potentially a pneumonectomy.
|00060-09| Those are the only two surgical choices he could have
|00060-10| been offered. If that could have been done and if
|00060-11| the mediastinum had not shown any tumor, there is a
|00060-12| potential for long term survival. If one takes a
|00060-13| patient like Mr. Horton however and just uses
|00060-14| radiation therapy, the -- there is less -- in the
|00060-15| range of 2% percent, five years survival for a
|00060-16| localized lung tumor. So, for resectable lung
|00060-17| malignancies of several types with the exception of
|00060-18| small cell cancer where no surgery is indicated, that
|00060-19| offers the best potential for long term survival or
|00060-20| even cure.
|00060-21| Q. Is there any evidence in the record that
|00060-22| you know of that tells you that if this had been
|00060-23| diagnosed in August or September that this tumor was
|00060-24| resectable?

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|00061-01| A. There is no information that says that
|00061-02| the tumor was resectable or unresectable. There were
|00061-03| opinions that it wasn't, but they were given in
|00061-04| February. No diagnosis had been attained for several
|00061-05| months prior to that.
|00061-06| Q. Tell me what would have been different in
|00061-07| August if you could write the script so that that
|00061-08| discussion about resection would have been
|00061-09| different. In other words, if the doctors in
|00061-10| February had a meeting and discussed whether or not
|00061-11| they could resection this tumor and conclude they
|00061-12| couldn't, what would have been required to have been
|00061-13| different back in August for them to have reached a
|00061-14| different conclusion?
|00061-15| MR. UPSHAW: I object to the form of the
|00061-16| question, Don. You just kind of rambled all over
|00061-17| with it.
|00061-18| Q. (By Mr. Davis) Did you understand what I
|00061-19| was saying, doctor?
|00061-20| A. Not precisely.
|00061-21| Q. Okay. I'm not a very good lawyer and I
|00061-22| have a tough time asking questions. What I'm trying
|00061-23| to find out is what would have needed to have been
|00061-24| different back in August so that the doctors could

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|00062-01| have concluded that the tumor was operable?
|00062-02| A. They didn't even have a diagnosis of

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|00062-03| tumor in August. Do you mean speculating if they
|00062-04| have done their biopsy?
|00062-05| Q. Yes. Exactly.
|00062-06| A. In August?
|00062-07| Q. Exactly. If they had done what they did
|00062-08| in February back in August.
|00062-09| A. If they had a diagnosis of malignancy of
|00062-10| the lung --
|00062-11| Q. In August.
|00062-12| A. Well, then they could have proceeded with
|00062-13| other diagnostic considerations as to whether or not
|00062-14| the tumor was operable.
|00062-15| Q. Yes. That's what I want to know. What
|00062-16| findings would they have had to have made in order to
|00062-17| have concluded it was operable?
|00062-18| A. They would have to have concluded that
|00062-19| his cat scan did not show any suggestion of tumor
|00062-20| activity in the mediastinum and it would have to have
|00062-21| a negative mediastinoscopy. That is, no tumor on the
|00062-22| mediastinoscopy. If that would have showed no tumor
|00062-23| then he would have been a candidate for an attempted
|00062-24| left lower lobe resection.
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|00063-01| Q. Based on the photographs that you have
|00063-02| seen here today for the first time, do they give you
|00063-03| any new information as to what in all probability the
|00063-04| characteristics were in that tumor back in August?
|00063-05| A. No.
|00063-06| Q. They don't?
|00063-07| A. No. Because too much time had elapsed.
|00063-08| That's almost a year from the time he was first
|00063-09| identified to have a problem in the chest until he
|00063-10| died and the postmortem exhibits that you showed me
|00063-11| were obtained. And we have already said before in
|00063-12| our discussions here that what the growth rates are
|00063-13| of tumors are not a predictable thing so how things
|00063-14| looked at the autopsy doesn't have anything to do
|00063-15| with what they might have looked at at the August
|00063-16| preceding.
|00063-17| Q. Okay. What is the effect of radiation
|00063-18| therapy on a tumor's growth such as this?
|00063-19| A. Radiation therapy when it's delivered to
|00063-20| a tumor like this can kill cancer cells or inhibit
|00063-21| their growth rates. Radiation therapy for lung
|00063-22| cancer is seldom curative, unfortunately. That's why
|00063-23| the first direction of treatment in the many
|00063-24| different types of lung cancer, with the exception of
-- PAGE00064 --------
|00064-01| small cell cancer, is surgery if at all feasible. If
|00064-02| there are no other contraindications that exist.
|00064-03| Q. Have you reviewed those portions of Mr.
|00064-04| Horton's autopsy which revealed the degree of
|00064-05| emphysema that was found present?
|00064-06| A. I reviewed the autopsy report generally
|00064-07| and the comments about that. I can't recall the
|00064-08| specific comments about the emphysema since I haven't
|00064-09| seen the report for sometime. I'd have to see it
|00064-10| again.
|00064-11| Q. Was it your impression from your review
|00064-12| of the records that the primary reason why the
|00064-13| physicians didn't do the surgery in February was
|00064-14| because of his emphysematous condition of his lungs?
|00064-15| MR. UPSHAW: I object to that, Don.
|00064-16| Q. (By Mr. Davis) Was that your conclusion?

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|00064-17| A. Well, my conclusion was from their tumor
|00064-18| board conference about Mr. Horton that they felt he
|00064-19| wasn't in good operative risk.
|00064-20| Q. Does that have something to do with the
|00064-21| condition of his lung?
|00064-22| A. That has to do with his general
|00064-23| condition. Now I can't remember the precise comments
|00064-24| that they made or didn't make about emphysema.

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|00065-01| Rather I think the major problems that they had were
|00065-02| lung function was poor and the size of the area that
|00065-03| appeared to be involved of the tumor was quite large
|00065-04| and close to the mediastinum. Those are the major
|00065-05| reasons, but in fact his pulmonary function tests,
|00065-06| although they were not normal by any means, weren't
|00065-07| an absolute contraindication to surgery. These are
|00065-08| arterialogical saturations and so on. Those are only
|00065-09| relative times that can be absolute
|00065-10| contraindications. In his situation, my recollection
|00065-11| of those, they were not absolute contraindications to
|00065-12| at least a potential consideration for a surgical
|00065-13| approach.
|00065-14| Q. What you are saying, if I understand you
|00065-15| then, is that that is simply a medical judgment that
|00065-16| the attending physicians had to make based on those
|00065-17| studies and their studying analysis of the tumor?
|00065-18| MR. UPSHAW: Object to the form of the
|00065-19| question. He's already said what he has to say,
|00065-20| Don. You are trying to get him to speculate on some
|00065-21| things.
|00065-22| A. I can only interpret the medical record
|00065-23| as it reflected their consideration. That is the
|00065-24| sizes of the tumor, the location of it and the fact

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|00066-01| that he had coexistent pulmonary disease and that he
|00066-02| had lost weight, some 25 pounds was somewhat wasted.
|00066-03| So his general functional status as well as his
|00066-04| physiological functional status and the evaluation of
|00066-05| the usual criteria that you go through to decide as
|00066-06| to whether a patient can undertake -- undergo a --
|00066-07| undergo a thoracotomy or not. All of those things
|00066-08| together allow you to make the decision and their
|00066-09| decision was not to operate.
|00066-10| Q. (By Mr. Davis) Okay. You have in front
|00066-11| of you a document which has been marked as Deposition
|00066-12| Exhibit 1, Dr. Smith. When is the first time you had
|00066-13| an occasion to see that document?
|00066-14| A. We, Mr. Sheffler and I and I think a
|00066-15| couple of other individuals from his legal firm, had
|00066-16| been talking on the initial occasion about Mr.
|00066-17| Horton's situation, then this document was
|00066-18| constructed and we discussed it on the telephone,
|00066-19| then it was sent to me at which time I reviewed it
|00066-20| and said that's -- that's fine.
|00066-21| Q. Okay. You didn't author the document
|00066-22| then?
|00066-23| A. No, I did not author the document, but I
|00066-24| reviewed it.

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|00067-01| Q. And approved it?
|00067-02| A. Yes.
|00067-03| Q. Let's go through it if you will. It says
|00067-04| after the first sentence -- well, let's include the
|00067-05| first sentence. It begins "If called, Dr. Smith will

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|00067-06| set forth his educational and professional
|00067-07| experiences and discuss the role in the oncologist in
|00067-08| the diagnosis and treatment of cancer."
|00067-09| With regard to Mr. Horton's case, what is
|00067-10| the role of an oncologist in the diagnosis and
|00067-11| treatment of cancer?
|00067-12| A. The role of the oncologist is to
|00067-13| establish the diagnosis of cancer if it's there or to
|00067-14| disqualify a diagnosis of cancer if it's suspected.
|00067-15| In the case of Mr. Horton when it was presented
|00067-16| initially, all they saw was a large cavity with fluid
|00067-17| on his chest x-ray and all the cancers was one of the
|00067-18| considerations. There were other potential
|00067-19| diagnostic procedures including lung abscess, which
|00067-20| was not the problem. But in any event, the
|00067-21| oncologist in this particular situation has to sort
|00067-22| out all the differential diagnoses and get to those
|00067-23| aspects of diagnostic techniques which can allow you
|00067-24| to get to the bottom of an often complicated medical
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|00068-01| situation.
|00068-02| Q. Has it ever taken you three or four
|00068-03| months to diagnose a lung cancer?
|00068-04| A. Not that I can recall.
|00068-05| Q. What's the longest period of time it's
|00068-06| ever taken you to diagnose a lung cancer?
|00068-07| A. A few weeks.
|00068-08| Q. Okay. Anything else about the role of
|00068-09| the oncologist in the diagnosis and treatments of
|00068-10| cancer as it pertains to Mr. Horton?
|00068-11| A. Well, if you don't get the diagnosis then
|00068-12| you can't get the treatment. He may lose the
|00068-13| opportunity. So the oncologist, although they are
|00068-14| internist trained in the recognition and treatment of
|00068-15| cancer, directs the diagnosis, number 1, and then
|00068-16| suggests treatment, whatever it is, whether it's
|00068-17| radiation or surgery or chemotherapy or some
|00068-18| combination of the three. So those are the
|00068-19| generalities of the role of the oncologist.
|00068-20| Q. Are you going to testify in this case,
|00068-21| Dr. Smith, that Mr. Horton died as a result of his
|00068-22| cancer diagnosis being delayed?
|00068-23| A. The only thing I can say is that Mr.
|00068-24| Horton died of cancer and it's unfortunate that there
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|00069-01| was a delay in diagnosis.
|00069-02| Q. But you are not going to say the two
|00069-03| connect?
|00069-04| A. I don't know if they do or if they don't.
|00069-05| Q. Okay. Next it says "Dr. Smith will
|00069-06| generally discuss carcinogenesis and the various
|00069-07| procedures used and information relied upon by
|00069-08| oncologists in diagnosing and treating cancers with
|00069-09| particular emphasis on lung cancer. " As it relates
|00069-10| to Nathan Horton's case, have you already described
|00069-11| your testimony in that regard?
|00069-12| A. In general terms, yes, we have discussed
|00069-13| it.
|00069-14| Q. Is there anything more specific that you
|00069-15| can think of at the moment that pertains to Mr.
|00069-16| Horton in that sentence?
|00069-17| A. No, I think we have discussed most of
|00069-18| those, the things we need to discuss.
|00069-19| Q. It next states that you will "testify

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about the mystery of cancer causation and the inability of medical science to explain why some cells become neoplastic while others do not. " What is the significance of that statement?

A. Well, after all these years, in Mr.

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Horton's case and in the case of many forms of cancer, we still don't have precise causes of cancer identified in the huge majority of situations. There have been decades of extremely detailed basic work to try to tell why some cells remain normal, some become malignant, what the controlling mechanisms are, etc. And no common thread of understanding as to cancer causation comes from these things. All we can say is that there are multi-factorial things and causation. Genetics, exposure to carcinogens, viruses and on into the night. No unifying concept of diseases have been demonstrated and that's going to continue to be a problem for the immediate future.

Q. Okay. Do you believe carcinogens cause cancer?

A. Where?

Q. Of the lung.

A. In cancer of the lung, associations with carcinogens have been reported but no precise carcinogens have ever been demonstrated to be causal of lung cancer in a man.

Q. When you say "causal of lung cancer," how are you using that word?

A. I mean that -- well, to draw parallel

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from other -- another area of medicine, there are so called Koch postulates. K-O-C-H. It was a bacteriologist.

Q. That has never applied to the science of oncology, have they?

A. It has to do with the proof of cause of a disease

Q. An infectious disease?

A. An infectious disease.

Q. Is this an infectious disease?

A. Viruses may be implicated.

Q. Is cancer an infectious disease?

A. Not that we know of at the moment. It may be to some degree. Certainly doesn't have any of the characteristics of other infectious diseases, but infectious agents have been implicated.

Q. Is it your opinion that medical students should be taught that Koch postulates should be applied in their analysis of cancers?

A. My opinion is a medical student should be taught to think broadly and to draw parallels.

Q. I want to ask you that question --

A. Concepts like that.

Q. Very specifically can you answer that

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question yes or no?

A. I think precise causation of disease is something that one needs to understand when it's possible. And when it's not evident, one has to admit it and then pursue precise causations so appropriate interventions can be made to alter the course of a malignancy or any other --

Q. Doctor, would you ever teach your

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|00072-09| students to try to apply Koch postulates in the study
|00072-10| and analysis of lung cancer?
|00072-11| A. I would -- I always teach my medical
|00072-12| students, and have for over 20 years, to be very
|00072-13| critical about what causes what, whether it's lung
|00072-14| cancer or anything else. And such proofs, causation
|00072-15| a la Koch postulates say with tuberculosis like with
|00072-16| the granulomas say that you showed me are not yet
|00072-17| achievable. Maybe next year. Maybe five years from
|00072-18| now. But association of one thing or another with a
|00072-19| disease does not define precise scientific causation.
|00072-20| Q. (By Mr. Davis) Okay. Does the practice
|00072-21| of medical require precise scientific causation in
|00072-22| order to reach a medical conclusion of causation?
|00072-23| A. No, it doesn't.
|00072-24| Q. Never has, has it?

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|00073-01| A. However, that doesn't mean that if
|00073-02| it's -- the understanding of a disease process can be
|00073-03| furthered, that you shouldn't pursue it. You would
|00073-04| do better with a management of disease the more
|00073-05| information you have.
|00073-06| Q. Certainly.
|00073-07| A. Particularly regarding causation.
|00073-08| Q. Okay. Anything else that you are going
|00073-09| to testify about the mystery of cancer causation and
|00073-10| the inability of medical science to explain why some
|00073-11| cells become neoplastic while others do not?
|00073-12| A. Not unless you have some additional
|00073-13| questions.
|00073-14| Q. I am just asking you is there any
|00073-15| specific area that you think the jury should be aware
|00073-16| of based on Nathan Horton's case?
|00073-17| A. Not that we haven't already discussed.
|00073-18| Q. Okay. The next paragraph begins "Based
|00073-19| upon his review of Nathan Horton's medical records,
|00073-20| Dr. Smith will discuss the clinical course and
|00073-21| treatment of Mr. Horton's cancer. " Have we already
|00073-22| pretty well covered that?
|00073-23| A. I think so.
|00073-24| Q. Is there any significant area that you

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|00074-01| can think of that we have left out? It was basically
|00074-02| a downhill course is what it amounts to, wasn't it?
|00074-03| A. Well, we have discussed the elements of
|00074-04| differential diagnosis. There were questions when
|00074-05| Mr. Horton first appeared for evaluation as to its
|00074-06| potential for the diagnosis, but these were evident
|00074-07| at the post mortem, so I think we have discussed the
|00074-08| elements of his medical situation to my satisfaction.
|00074-09| Q. Okay. A lot of questions could have been
|00074-10| raised prior to and during his illness that are sort
|00074-11| of erased at autopsy; correct?
|00074-12| MR. UPSHAW: Object to the form of it.
|00074-13| A. A few possibilities as to potential
|00074-14| diagnosis of other malignancies was removed by the
|00074-15| autopsy examination.
|00074-16| Q. (By Mr. Davis) Okay.
|00074-17| A. For instance, the possibility of
|00074-18| lymphoma. This was not shown as postmortem although
|00074-19| there were some very -- some suggestive
|00074-20| characteristics of this. There were some things
|00074-21| about his illness that were not explained by his
|00074-22| autopsy.

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|00074-23| Q. Such as?
|00074-24| A. His severe anemia for one thing, which

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|00075-01| was never addressed by his physician. In fact, he
|00075-02| had two units of blood transfusion early in the
|00075-03| course of his disease because he had about half of
|00075-04| the red blood cells that we would normally have. It
|00075-05| did do some x-rays to see if he was bleeding from his
|00075-06| stomach and so on, but this was never explained at
|00075-07| the autopsy nor during the course of his disease. He
|00075-08| also had nodules in the prostate and there was a
|00075-09| question as to weather the tumor might have arisen
|00075-10| there, but this was erased by the autopsy examination
|00075-11| of that tissue. Those are the two major things --
|00075-12| the three major things that came to mind as I
|00075-13| reviewed the charts before his autopsy before he was
|00075-14| dead.
|00075-15| Q. Okay. Anything else of significance that
|00075-16| you can think of?
|00075-17| A. No.
|00075-18| Q. Next statement says, "He will testify
|00075-19| that Mr. Horton's cancer was a rare undifferentiated
|00075-20| cancer and was not of a type that has been
|00075-21| statistically associated with cigarette smoking."
|00075-22| What are you referring to there, sir?
|00075-23| A. Well, the histologic type of cancer,
|00075-24| giant cell carcinoma, is a fairly rare type of

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|00076-01| carcinoma of the lung and has not been statistically
|00076-02| associated with smoking. Oat cell or small cell
|00076-03| cancer of the lung or squamous cell cancers are the
|00076-04| most frequently associated primary malignancies of
|00076-05| the lung that have been reported to have the highest
|00076-06| association with smoking. Adenocarcinomas there is
|00076-07| some question about. There are not enough of these
|00076-08| patients identified to date, that is, patients with
|00076-09| giant cell cancers of the lung to merit any analysis
|00076-10| suggesting any kind of association with smoking.
|00076-11| It's not even mentioned in any of the -- in any of
|00076-12| the oncology texts, that I can recall of, as being
|00076-13| associated with smoking.
|00076-14| Q. Is adenocarcinoma associated with smoking
|00076-15| in the oncology text that you have knowledge of?
|00076-16| A. There is a lot of debate about that and
|00076-17| the latest -- the most recently published oncology
|00076-18| text I guess is Medical Oncology by Calabresi. It
|00076-19| was published in 1985. And in that text in the
|00076-20| chapter on lung cancer the statement is made, as I
|00076-21| made it to you, that the association was between
|00076-22| squamous cell, oat cell cancer with smoking. This
|00076-23| association is quite high and there is a great deal
|00076-24| of debate in question as to whether or not

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|00077-01| adenocarcinomas are frequently associated with
|00077-02| smoking. So there are those in the past if one goes
|00077-03| back through the last couple of decades through other
|00077-04| writings on lung cancer. For instance, on the other
|00077-05| two texts that I mentioned with which you are
|00077-06| familiar that adenocarcinomas may or may not be, but
|00077-07| right now there is a great deal of debate about that.
|00077-08| Q. Okay. Doctor, do you ever counsel
|00077-09| patients to stop smoking?
|00077-10| A. In -- from a public health point of view
|00077-11| in a general sense I have often, you know, told

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|00077-12| patients that smoking is not in their best interest,
|00077-13| yes.
|00077-14| Q. And is that the reason because it's not
|00077-15| in their best interest health-wise that you counsel
|00077-16| them to do that?
|00077-17| A. Because of the association of smoking
|00077-18| with many types of medical disorder.
|00077-19| Q. Is there any question in your mind as a
|00077-20| medical physician that smoking does in fact cause
|00077-21| some types of lung cancer?
|00077-22| A. There is a very high association with
|00077-23| certain types of lung cancer as I have mentioned.
|00077-24| None at all with other types of lung cancer like with

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|00078-01| bronchial alveolar carcinoma of the lung, which is a
|00078-02| form of adenocarcinoma. There isn't any data for
|00078-03| this kind of lung cancer and, as mentioned
|00078-04| previously, there hasn't been any precise carcinogen
|00078-05| in smoking identified as of this moment. So the
|00078-06| degree of association is there in some kinds of the
|00078-07| many different types of lung cancer, but not in all
|00078-08| and a precise identifiable agent or agents is not yet
|00078-09| within our grasp.
|00078-10| Q. Okay. Doctor, as an oncologist do you
|00078-11| have a particular theory of carcinogenesis that you
|00078-12| teach, a mechanism, a one stage or two stage, an
|00078-13| initiator/promoter? Do you have a theory of how
|00078-14| cancer begins that you teach?
|00078-15| A. What we do is to, in general terms, state
|00078-16| that there are a number of theories and that we do
|00078-17| not know whether one or some combination of them is
|00078-18| in fact more than a hypothesis at the moment. It's
|00078-19| very confusing. Many people have been working on the
|00078-20| basic aspects of this for a long time, which are
|00078-21| beyond my area of expertise, and haven't yet settled
|00078-22| on any agreeable pattern of whether there are --
|00078-23| whether it is all oncogenous or whether promoters are
|00078-24| important or whether viruses can do it or carcinogens

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|00079-01| or both together in some unknown combination.
|00079-02| Whether this unmasks genetic DNA readouts which can
|00079-03| lead to malignant change. None of these directions
|00079-04| are yet clear at all. It's very confusing. So the
|00079-05| teaching now is to, as it always has been, is to
|00079-06| outline various hypotheses as they are at the moment
|00079-07| and hope that continuing scientific review of
|00079-08| delineating are more clear.
|00079-09| Q. What is the affect on lung tissue of
|00079-10| cigarette smoke as you understand it?
|00079-11| A. Well, cigarette smoke can be directly
|00079-12| irritating. After the passage of some period of
|00079-13| time, some people develop chronic bronchitis where
|00079-14| the -- there is a chronic low grade inflammation in
|00079-15| the bronchial tubes. Lots of irritants can do that
|00079-16| though. Industrial pollutants, smoke, chemical
|00079-17| inhalations, various exposures of one type or
|00079-18| another. Chronic obstructive lung disease,
|00079-19| association with some kinds of carcinoma of the lungs
|00079-20| and emphysema.
|00079-21| Q. It can range then from merely causing an
|00079-22| inflammation all the way down to emphysema and lung
|00079-23| cancer?
|00079-24| MR. UPSHAW: I object to the form. He

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didn't use the word "cause" at all. You are putting words in his mouth.
Q. (By Mr. Davis) Is that what you said?
A. I didn't say "cause," that's true. I said that the associations with these things has been noted.
Q. (By Mr. Davis) And let's start from ground one. Inflammation.
A. Right.
Q. Cigarette smoking is associated with inflammation of the lung?
A. Well, any chronic irritant whether it's cigarette smoke or it's a bladder infection in a little old lady leads to inflammation.
Q. Now, you said "leads to inflammation." Are you saying that means it's associated with inflammation or it causes inflammation from a medical standpoint?
A. Yeah. Well, you can if you have a heavier irritant exposure to any inhalant get a little inflammation. Now, the inflammatory response in say a chronic bronchitis doesn't mean that the major thing that's going on in the lung is inflammation. It's a complicated process which has

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irritation and some degree of inflammation involved with it and later some breakdown of alveoli, some spasm of the bronchial tubes, some -- later some destruction of lung tissue and scar formation and perspiratory insufficiency. So that if one inhales a little smoke, you get a trace of a little irritation. If you inhale a lot, say you have never smoked and you smoke four packs in a day, you are going to have a pretty red hot acute bronchitis.
Q. Is that associated with smoking or was that caused by smoking?
A. In that situation I would say it was caused.
Q. If one smokes two packs of cigarettes a day for 35 years and gets lung cancer, that could be caused by smoking, couldn't it?
A. It could be, but there was lung cancer before smoking.
Q. Okay. Doctor, the next statement says that you will base your opinions on Mr. Horton's medical records and materials, medical and scientific information reasonably relied upon by members of your medical specialty and your professional training and experience as an oncologist. Are you dependent upon

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your conclusion that he had giant cell cancer on Dr. Wheeler's interpretation of the slides for you?
A. Predominately on Dr. Wheeler's interpretation as an expert tumor pathologist and on the diagnosis and treatment of cancer is a multi-disciplinary thing involving oncologists. That is, an internal medicine oncologist, surgical oncologist, pathologist, radiation oncologist and so on. So we work together and each has some understanding of pathology, but not as much as Dr. Wheeler. So his opinion is infinitely more important than mine.
Q. I guess my point being that since there is no mention in the autopsy by those pathologists of

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|00082-15| this being a giant cell tumor, there is nothing in
|00082-16| these records that tell you it's a giant cell tumor,
|00082-17| you have to go to the slides and an interpretation of
|00082-18| it; is that accurate?
|00082-19| MR. UPSHAW: I object to the form of that
|00082-20| question.
|00082-21| Q. (By Mr. Davis) You can answer if you can
|00082-22| remember it.
|00082-23| A. Well, we came to that conclusion on the
|00082-24| basis of the review of the slide material.

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|00083-01| Q. Not on the basis of review of the written
|00083-02| autopsy report?
|00083-03| A. No. Because I don't care who does an
|00083-04| autopsy or who does a biopsy, if I have to analyze
|00083-05| anyone's medical situation, alive or dead, I review
|00083-06| all the materials myself. Whether it's a medical
|00083-07| chart, biopsy and so on. Just as a matter of habit
|00083-08| and procedure.
|00083-09| Q. Okay. Is there any other material other
|00083-10| than the slides which Dr. Wheeler reviewed with you
|00083-11| upon which you base your conclusion that it was a
|00083-12| giant cell tumor?
|00083-13| MR. UPSHAW: He just testified to that,
|00083-14| didn't he, Don?
|00083-15| MR. DAVIS: Well, I'm asking it in the
|00083-16| other direction.
|00083-17| MR. UPSHAW: Well, we object to it.
|00083-18| A. The slide interpretation was what we
|00083-19| based our opinion on.
|00083-20| Q. (By Mr. Davis) Is there anything about
|00083-21| the history of the cancer that would have led you to
|00083-22| that conclusion?
|00083-23| A. You can't make the histologic diagnosis
|00083-24| of a tumor from a history. It's impossible.

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|00084-01| Q. Is there anything about the treatment of
|00084-02| the tumor that led you to that conclusion?
|00084-03| A. No.
|00084-04| Q. Okay. Is there anything about the
|00084-05| progression of Mr. Horton's physical case after he
|00084-06| was diagnosed which would lead you to that
|00084-07| conclusion?
|00084-08| A. There is only one element and it's a
|00084-09| negative statement regarding diagnosis and natural
|00084-10| course of disease that might pertain to Mr. Horton.
|00084-11| That is that one would know before the biopsy that it
|00084-12| wasn't both the small cell cancer of the lung because
|00084-13| if he had small cell cancer in August or September
|00084-14| when he presented it to his physician he wouldn't
|00084-15| have lived to get the biopsy in February because
|00084-16| that's the rapid natural course of that disease.
|00084-17| Virtually, all the other kinds of lung cancer,
|00084-18| whether it's squamous, adenocarcinoma, alveolar,
|00084-19| pulmonary blastoma, etc., etc., have courses which
|00084-20| are compatible in duration of time with that of Mr.
|00084-21| Horton. So we couldn't make the distinction on that
|00084-22| basis.
|00084-23| Q. Is there any specific medical literature
|00084-24| which you are relying on in this case?

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|00085-01| A. No precise medical literature except to
|00085-02| say that the text that we have cited are generally
|00085-03| accepted text that medical oncologists and others

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|00085-04| would depend upon.
|00085-05| Q. There is no recent study or journal
|00085-06| review that you are aware of that applies to Mr.
|00085-07| Horton's case that comes to mind at the moment?
|00085-08| A. No. The text medical oncology was
|00085-09| published for instance in 1985, which is a very
|00085-10| recent companion of all kinds of information about
|00085-11| lung cancer and there hasn't been too much new
|00085-12| information accrued about lung cancers between then
|00085-13| and now.
|00085-14| Q. Okay. I think I have concluded going
|00085-15| over what I have been told your testimony will be in
|00085-16| Lexington. Is what we have discussed here today what
|00085-17| you understand you are going to be testifying about
|00085-18| when you come to Lexington for the trial?
|00085-19| A. Well, you know, I don't know what I'd be
|00085-20| talking about tomorrow to anybody, but I'm not trying
|00085-21| to be facetious. I don't know what else we could
|00085-22| address. This is pretty complete. If I was asked to
|00085-23| testify at any trial, I'll just try to answer the
|00085-24| best I can.
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|00086-01| Q. Do you know of any other significant
|00086-02| aspect of Mr. Horton's case that plays an important
|00086-03| role in your conclusions and opinions that we haven't
|00086-04| discussed?
|00086-05| A. No, I don't.
|00086-06| Q. Okay. Number 1, if I can summarize, to
|00086-07| your mind we have a primary lung cancer; correct?
|00086-08| A. Yes.
|00086-09| Q. Number two, in your opinion based upon
|00086-10| Dr. Whitaker's review with you, you believe it to be a
|00086-11| giant cell tumor?
|00086-12| A. Yes.
|00086-13| Q. You do not know of any occupational or
|00086-14| employment exposure which you can point to as having
|00086-15| caused this cancer?
|00086-16| MR. UPSHAW: I object to that. That's
|00086-17| not what he said.
|00086-18| Q. (By Mr. Davis) Okay. Do you?
|00086-19| A. I don't have actually enough information
|00086-20| about his occupational history because it's not on
|00086-21| the medical chart. I would like to have a little
|00086-22| more occupational history as any physician would on
|00086-23| any patient on his malignancy.
|00086-24| Q. Sitting here today within a month of the
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|00087-01| day we go to trial, if you were sitting in the
|00087-02| witness stand in Lexington right now and I asked you
|00087-03| that question, then you would have to say, "I know of
|00087-04| no other exposure that I can identify as having
|00087-05| caused it"; is that correct?
|00087-06| MR. UPSHAW: Object to the form of it.
|00087-07| A. At this moment I don't.
|00087-08| Q. (By Mr. Davis) Okay. Have you ever done
|00087-09| any consultation work for the surgeon general?
|00087-10| A. No.
|00087-11| Q. You have stated in the summary provided
|00087-12| to me that in your opinion this is not the type of
|00087-13| cancer that has been, quote, statistically associated
|00087-14| with cigarette smoking. We discussed that a minute
|00087-15| ago. What is your best medical opinion as to why
|00087-16| some forms of lung cancer are associated with
|00087-17| cigarette smoking?

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|00087-18| A. That's totally unknown. I wish I did
|00087-19| know. I honestly don't have an answer nor does
|00087-20| anyone else at the moment. There are thousands of
|00087-21| people exploring the possibilities that exist there,
|00087-22| but that's basically the answer is there is no known
|00087-23| reason why small cell cancers is such a lethal form
|00087-24| of cancer as a high degree of association of smoking

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|00088-01| as bronchial alveolar carcinoma has none at all.
|00088-02| There is no known answer.
|00088-03| Q. What, as a teacher, do you teach your
|00088-04| students about the relationship between smoking and
|00088-05| emphysema?
|00088-06| A. Our medical students are taught that
|00088-07| associations of personal habits of many types are
|00088-08| associated with increased risks for various disease.
|00088-09| In the case of smoking, there is an association and
|00088-10| increased risk for lung tumors and for heart attacks
|00088-11| and smoking and so on as there is an association of
|00088-12| Laennec's cirrhosis with drinking.
|00088-13| Q. Okay. You are then convinced as a
|00088-14| medical doctor that there is an increased risk of
|00088-15| lung cancer and emphysema if you choose to smoke?
|00088-16| MR. UPSHAW: Object to the form of that.
|00088-17| Q. (By Mr. Davis) Is that correct?
|00088-18| A. The risks -- the risks increase for lung
|00088-19| cancer with smoking.
|00088-20| Q. Do they also increase for emphysema?
|00088-21| A. There are -- the risks increase, but
|00088-22| there are many patients who smoke who don't have
|00088-23| emphysema like there are many patients who smoke who
|00088-24| don't have lung cancer and never get it. We don't

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|00089-01| know why.
|00089-02| Q. You are a smoker; correct?
|00089-03| A. Uh-huh.
|00089-04| Q. How many packs a day do you smoke?
|00089-05| A. About a pack and a half.
|00089-06| Q. Have you ever tried to quit?
|00089-07| A. Not really.
|00089-08| Q. You just don't want to quit?
|00089-09| A. I have thought about it.
|00089-10| Q. What have you thought about it?
|00089-11| A. I thought it would be a good idea.
|00089-12| Q. Why do you think it would be a good idea
|00089-13| if Dr. Frank Smith stops smoking?
|00089-14| A. Well, but I like smoking so that's
|00089-15| overruled.
|00089-16| Q. Okay. Do you know what the risks are
|00089-17| that you will get lung cancer when you are 50 years
|00089-18| of age if you have smoked for 30 years?
|00089-19| A. I am over 50.
|00089-20| Q. Do you know what your risk factor is for
|00089-21| getting lung cancer?
|00089-22| A. I have never thought about it, but I can
|00089-23| figure it out.
|00089-24| Q. What would you estimate it to be?

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|00090-01| A. Oh, my risk is about maybe ten times that
|00090-02| of the general population.
|00090-03| Q. Okay. Doctor, what are you being paid
|00090-04| for your time by American Tobacco Company?
|00090-05| A. Our usual consultation fees, which
|00090-06| usually amounts to about $300 an hour.

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|00090-07| Q. Is that including expenses?
|00090-08| A. No.
|00090-09| Q. Expenses are on top of that?
|00090-10| A. If I have to travel some, yes.
|00090-11| Q. Otherwise not.
|00090-12| Q. How much have you been paid to date by
|00090-13| American Tobacco Company in this case?
|00090-14| A. About $1,800.
|00090-15| Q. So you have spent five or six hours?
|00090-16| MR. UPSHAW: Well, you asked him how much
|00090-17| he has been paid, not how much time he has spent.
|00090-18| Q. My math is probably poor also.
|00090-19| MR. UPSHAW: He might not have been paid
|00090-20| for all the time he's spent. I don't know if he has
|00090-21| submitted us a bill.
|00090-22| Q. (By Mr. Davis) Let's go back the other
|00090-23| way, doctor.
|00090-24| A. No, I haven't.

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|00091-01| Q. How many hours would you estimate you
|00091-02| have spent on this case?
|00091-03| A. Oh, I guess with meetings, reading the
|00091-04| charts and so on, about eight hours, ten hours.
|00091-05| Q. Is there anything that you feel like you
|00091-06| need to do between now and the time of trial in order
|00091-07| to be ready to testify at trial?
|00091-08| A. Not that I can think of.
|00091-09| Q. Are there any studies or tests that are
|00091-10| going on at the moment that you are aware of by
|00091-11| anyone concerning Nathan Horton in this case?
|00091-12| A. None that I am aware of.
|00091-13| Q. What other doctors have you talked to
|00091-14| concerning this case other than Dr. Wheeler and the
|00091-15| doctors that came to Houston to meet with you?
|00091-16| A. No others.
|00091-17| Q. No others?
|00091-18| A. No.
|00091-19| Q. Have you participated in any mock trials
|00091-20| concerning tobacco litigation?
|00091-21| MR. UPSHAW: I object to the form of that
|00091-22| question.
|00091-23| Q. (By Mr. Davis) I don't even know if you
|00091-24| know what a mock trial is, but --

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|00092-01| A. No.
|00092-02| Q. -- have you ever had occasion to act like
|00092-03| an expert witness in front of an assembled panel to
|00092-04| see their reaction to certain issues?
|00092-05| A. Well, I have asked the attorneys here for
|00092-06| advice about giving a deposition because I haven't
|00092-07| given very many in my professional life and we have
|00092-08| had some posed questions.
|00092-09| Q. Would one of them act like they were the
|00092-10| plaintiff's attorney and ask questions of you to get
|00092-11| your responses?
|00092-12| A. There were no formal kind of a courtroom
|00092-13| situation.
|00092-14| Q. No, but I mean in the office.
|00092-15| A. Just asking questions and how would you
|00092-16| reply to them or how might you reply to such
|00092-17| questions, that type of thing.
|00092-18| Q. After your responses were given, did they
|00092-19| suggest different ways you might change your answer?
|00092-20| A. The major advice I got was to pay close

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|00092-21| attention to the questions and try to answer
|00092-22| truthfully and honestly whatever was posed to me.
|00092-23| Q. Were the other doctors present at that
|00092-24| same time?

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|00093-01| A. No.
|00093-02| Q. This was just --
|00093-03| A. No, this was just in discussions with Mr.
|00093-04| Sheffler and Mr. Bezanson in particular.
|00093-05| Q. Okay. And when did that occur?
|00093-06| A. We talked briefly before this meeting
|00093-07| over a club sandwich and Mr. Sheffler and I just had
|00093-08| a few interchanges on the plane from here to Houston,
|00093-09| and the last time we got together, Mr. Bezanson and
|00093-10| Mr. Sheffler and I, in Houston about a month ago or
|00093-11| really that was the time we just kind of got together
|00093-12| for a social event at one of our meetings that we
|00093-13| discussed briefly.
|00093-14| Q. Okay. Which attorney was it that was
|00093-15| acting like the plaintiff's attorney and posing the
|00093-16| questions to you?
|00093-17| A. Well, we -- my recollection is we just
|00093-18| kind of -- Mr. Bezanson might ask some and Mr.
|00093-19| Sheffler might ask some.
|00093-20| Q. All right.
|00093-21| A. Told me not to get upset.
|00093-22| Q. Have I been courteous to you?
|00093-23| A. Very courteous.
|00093-24| MR. BEZANSON: Well, we didn't know that

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|00094-01| for sure.
|00094-02| Q. (By Mr. Davis) Doctor, is it possible in
|00094-03| this case for you to say that smoking absolutely did
|00094-04| not play any part in Nathan Horton's lung cancer?
|00094-05| A. It's not possible to say whether it did
|00094-06| or whether it didn't.
|00094-07| Q. What would you estimate would be --
|00094-08| MR. UPSHAW: He wasn't through with his
|00094-09| answer.
|00094-10| Q. (By Mr. Davis) I'm sorry. Excuse me.
|00094-11| A. That is, you know, we have stated so many
|00094-12| times here this afternoon that there are associations
|00094-13| for some kinds of lung cancer with smoking are quite
|00094-14| high and others there are no known associations.
|00094-15| Now, on an individual -- statistics or associations
|00094-16| only apply to large numbers of people. To the
|00094-17| individual patient like Mr. Horton who unfortunately
|00094-18| developed a cancer which was lethal, one has no way
|00094-19| of knowing with our present level of scientific
|00094-20| knowledge as to whether smoking had anything to do
|00094-21| with his cancer or not. There are patients even with
|00094-22| the high risk carcinoma of the lung like squamous
|00094-23| cell cancer and small cell cancer who have never
|00094-24| smoked. Well, why did they get it? You know, they

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|00095-01| didn't smoke. And lung cancer was here before
|00095-02| smoking was ever a predominate preoccupation of the
|00095-03| American population.
|00095-04| Q. To your knowledge what was the first year
|00095-05| that a lung cancer was removed from a chest?
|00095-06| A. I can't remember when the first
|00095-07| pneumonectomy was performed, but I believe it was in
|00095-08| 19 -- I don't know. I think it was in 1920's,
|00095-09| thirties. It wasn't that long ago historically

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|00095-10| because such -- but I don't remember precisely when
|00095-11| it was. I knew it at one time.
|00095-12| Q. Dr. Smith, I think we have covered this
|00095-13| completely, but I want to make absolutely certain the
|00095-14| record is clear because counsel opposite asked one of
|00095-15| my witnesses to do so. If I were to give you the
|00095-16| autopsy report and ask you to underline everything in
|00095-17| it that led you to the conclusion that this was giant
|00095-18| cell carcinoma, am I correct in saying that as far as
|00095-19| the written autopsy report is concerned there would
|00095-20| be nothing for you to underline because your
|00095-21| diagnosis is based upon your slide interpretation of
|00095-22| Dr. Wheeler?
|00095-23| A. That's right. You can't tell a cell type
|00095-24| of any malignancy in any organ system by gross

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|00096-01| examination of a histologic interpretation. The
|00096-02| autopsy is a gross physical examination after death.
|00096-03| Q. Do you have an opinion about what
|00096-04| percentage of lung cancers are caused by smoking?
|00096-05| MR. UPSHAW: Object to the form of the
|00096-06| question. He hasn't testified today that any are.
|00096-07| As a matter of fact, he is consistent in saying that
|00096-08| no one knows what causes lung cancer.
|00096-09| A. Estimates have been made as to the
|00096-10| associations. And in males, one association figure
|00096-11| has been about estimated to be about 80 percent of
|00096-12| lung cancers associated with smoking.
|00096-13| Q. (By Mr. Davis) Is that a figure you
|00096-14| would be comfortable in agreeing with as an
|00096-15| oncologist?
|00096-16| A. It's a figure that appears in a text of
|00096-17| epidemiology and cancer prevention by Shottenfeld,
|00096-18| 1982, and it's called Cancer Epidemiology and
|00096-19| Prevention in the chapter on lung cancer. 40
|00096-20| percent -- in that same chapter, I think it's 40
|00096-21| percent of lung cancer in women as associated with
|00096-22| smoking but you have to remember that chapter was
|00096-23| published in 1982.
|00096-24| Q. Do you have an opinion on whether or not

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|00097-01| Nathan Horton had emphysema?
|00097-02| A. Mr. Horton had chronic obstructive lung
|00097-03| disease and I can't remember the precise descriptions
|00097-04| in the autopsy report as to the lungs regarding
|00097-05| emphysema.
|00097-06| Q. Let me hand you the first page and that
|00097-07| might be of assistance, Dr. Smith.
|00097-08| A. Thanks.
|00097-09| And number three diagnosis is moderately
|00097-10| advanced emphysema with some bowling formation.
|00097-11| Q. In your opinion, would that emphysema
|00097-12| have been caused in part by his 60-pack year history
|00097-13| of smoking?
|00097-14| MR. UPSHAW: I object to the form of the
|00097-15| questions. You keep wanting to use the word
|00097-16| "cause."
|00097-17| MR. DAVIS: Yes, I do.
|00097-18| A. Well, I still can't accept the word
|00097-19| "cause" in this individual's situation. In large
|00097-20| groups of smokers for long periods of time there is
|00097-21| lots of emphysema, but in his particular case there
|00097-22| isn't anyone on earth that can say that his smoking
|00097-23| caused his emphysema. We don't get back to the cause

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|00097-24| and effect question. The precise situation and the
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|00098-01| individual patient and this question is unanswerable.
|00098-02| Q. Do you know of any exposure that he may
|00098-03| have had other than cigarette smoking which may have
|00098-04| caused his emphysema?
|00098-05| A. No, I don't.
|00098-06| Q. Okay. Based upon the autopsy report and
|00098-07| your study of the records, is it your opinion that
|00098-08| his death was in fact caused in part by both his
|00098-09| emphysema and his lung cancer?
|00098-10| A. The number one cause of death listed on
|00098-11| his autopsy report is cancer. And the number three
|00098-12| contributing cause of death was his emphysema. So
|00098-13| there were -- so the leading cause of death is the
|00098-14| malignancy that he had and the other two existed and
|00098-15| contributed to any opinion of the pathologist to
|00098-16| perform the examination.
|00098-17| Q. Do you share that opinion?
|00098-18| A. That's the opinion of the pathologist
|00098-19| that performed the autopsy. I think the cancer
|00098-20| killed him and everything else had very little
|00098-21| significance, but -- because I think the malignancy
|00098-22| would have killed him irrespectively than virtually
|00098-23| anything else.
|00098-24| Q. Okay. Have you ever performed or
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|00099-01| participated in any study or epidemiological work
|00099-02| which addressed the relationship between smoking and
|00099-03| lung cancer or smoking and emphysema?
|00099-04| A. No.
|00099-05| Q. Have you done any type of clinical
|00099-06| studies concerning smoking and cancer or smoking and
|00099-07| emphysema?
|00099-08| A. No. I'm a medical oncologist so I have
|00099-09| to address all of my time to the treatment of those
|00099-10| who have the problems now. Epidemiological studies
|00099-11| are done by epidemiologists, but I am a function and
|00099-12| clinician. I look after people who are ill.
|00099-13| Q. You are not concerned with what caused
|00099-14| their condition as much as what you can do about it?
|00099-15| A. I didn't say that.
|00099-16| Q. Well, I didn't mean to be facetious.
|00099-17| Don't get my wrong.
|00099-18| A. No, I am very concerned with what causes
|00099-19| these things.
|00099-20| Q. I mean in your daily treatment of
|00099-21| patients it's too late at that time, isn't it?
|00099-22| A. In -- well, if there is someone who
|00099-23| appears with an advanced malignant disease from the
|00099-24| time it's first identified, it's already been going
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|00100-01| for several years so you can't do anything about
|00100-02| intervening with whatever caused it at that time.
|00100-03| Q. Have you ever written any articles or
|00100-04| papers on the relationship between smoking, lung
|00100-05| cancer or smoking and any health-related illness?
|00100-06| A. No. Those are mainly public health
|00100-07| issues in terms of studies or epidemiologic issues
|00100-08| and I have been a bedside clinician and researcher
|00100-09| all my professional life.
|00100-10| Q. Have you ever consulted with anyone who
|00100-11| was doing such a study?
|00100-12| A. Oh, yes.

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http://legacy.library.ucsf.edu/tid/qmf70a00/pdf www.industrydocuments.ucsf.edu/docs/mgl0001

|00100-13| Q. To give them information and data that
|00100-14| they used in their study?
|00100-15| A. No. Not to give them information to be
|00100-16| used in their studies, but I helped people that were
|00100-17| involved in studies utilizing smokers and --
|00100-18| Q. Tell me about that -- excuse me, I didn't
|00100-19| mean to interrupt. Just go ahead and tell me about
|00100-20| that instance.
|00100-21| A. Well, they're -- Baylor like any medical
|00100-22| school has a number of studies going in any
|00100-23| particular given time. And, for instance, at the
|00100-24| moment a person in our department of pharmacology is
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|00101-01| interested in running particular tests on exfoliated
|00101-02| cells from smokers and could I get some samples for
|00101-03| him from the patients, you know, that we have.
|00101-04| Q. Who is that investigator?
|00101-05| A. Dr. Gupta. G-U-P-T-A.
|00101-06| Q. Okay.
|00101-07| A. And he's trying to evaluate basic
|00101-08| phenomena and exfoliated cells in smokers versus
|00101-09| non-smokers. It's a variation of an old theme which
|00101-10| is what's different between cancer cells and
|00101-11| malignancy cells. And he's evaluating the cells that
|00101-12| are exfoliated in the sphere from smokers and
|00101-13| non-smokers hoping he would find some delineable
|00101-14| difference in nucleic acid makeup or incorporation
|00101-15| changes of amino acids versus normal exfoliation.
|00101-16| Q. Any other assistance that you have been
|00101-17| to any investigators on smoking and health studies
|00101-18| that you are aware of?
|00101-19| A. Some investigators a few years ago at
|00101-20| Baylor asked me some basic questions. They were
|00101-21| pulmonologists interested in doing the bronchioscopic
|00101-22| evaluation of macrophage function in smokers. I
|00101-23| wasn't involved in any of these studies, but they
|00101-24| asked me as an oncologist about patient accrual, what
-- PAGE00102 --------
|00102-01| I thought of the studies and so on.
|00102-02| Q. What is the function of a macrophage when
|00102-03| smoke is being inhaled into the lungs?
|00102-04| A. I don't know. But macrophage of course
|00102-05| are there to attack, you know, a number of things
|00102-06| that -- in any part of the body, microorganisms,
|00102-07| bacteria, viruses, as part of the defense process of
|00102-08| the body, whether it macrophages in the lung or not.
|00102-09| Apparently, they don't do their job quite as well in
|00102-10| the smokers.
|00102-11| Q. From your standpoint, as an oncologist,
|00102-12| are there any health benefits to smoking?
|00102-13| A. Well, it's relaxing to a lot of people.
|00102-14| I can't think of anything to advise smoking for
|00102-15| health benefits.
|00102-16| Q. There are definitely some risks involved
|00102-17| to your health in smoking, aren't there?
|00102-18| A. There are some risks.
|00102-19| Q. In your opinion do the risks involved in
|00102-20| smoking outweigh any benefits in smoking?
|00102-21| MR. UPSHAW: Object to the form of that
|00102-22| question.
|00102-23| A. Can't answer that question really. If
|00102-24| you asked me that when I was a hundred years old, if
-- PAGE00103 --------
|00103-01| I make it and I am still smoking, then I would say

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/fulltext.jsp?BACK_TO_SUMMARY_VIEW%3D0%26COLO_FieldName%3DCASE_N

|00103-02| well it didn't make any difference. On the other
|00103-03| hand, if you ask me that question next year and I
|00103-04| have got some kind of cancer of the lung, then I'd
|00103-05| say, well, maybe I should have -- if I would have
|00103-06| known my risk was going to become a specific number
|00103-07| then I wouldn't have done it; but these are --
|00103-08| driving down the highway is a risk, you know. Just
|00103-09| depends on the way you look at it.
|00103-10| Q. (By Mr. Davis) What kinds of cancer is
|00103-11| caused by exposure to ultraviolet rays?
|00103-12| MR. UPSHAW: I object to the form of
|00103-13| that.
|00103-14| A. Well, ultraviolet radiation enhances the
|00103-15| development of skin cancers.
|00103-16| Q. (By Mr. Davis) What's the word for
|00103-17| that? Skin cancers, what are they called?
|00103-18| A. They are called just squamous cell cancer
|00103-19| of the skin or basal cell.
|00103-20| Q. Basal. How do you spell that?
|00103-21| A. B-A-S-A-L.
|00103-22| Q. That is not a form of cancer of the lung,
|00103-23| is it?
|00103-24| A. No.

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|00104-01| Q. Doctor, have you given me all the
|00104-02| opinions that you hold concerning the Nathan Horton
|00104-03| case?
|00104-04| A. I think so.
|00104-05| Q. Is there anything you need to add to or
|00104-06| develop for me to have all of the basis for your
|00104-07| opinions other than what we have discussed today?
|00104-08| A. I don't think so.
|00104-09| Q. Okay. I don't believe I have anything
|00104-10| further. Thank you very much for your time.
|00104-11|
|00104-12| _____
|00104-13| FRANK E. SMITH, M.D.
|00104-14| SUBSCRIBED AND SWORN to before me,
|00104-15| the undersigned authority, on this the _____ day of
|00104-16| _____, 1987.
|00104-17|
|00104-18| _____
Notary Public in and for
the State of Texas

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|00105-01| THE STATE OF TEXAS
|00105-02| I, Jerri Trousdale, Certified
|00105-03| Shorthand Reporter in and for the State of Texas,
|00105-04| hereby certify that at the time and place stated the
|00105-05| witness, Frank E. Smith, M.D., personally appeared
|00105-06| before me and after being by me first duly sworn to
|00105-07| tell the truth, was examined by counsel for the
|00105-08| respective parties hereto; that the testimony of said
|00105-09| witness was taken in shorthand by me, later reduced
|00105-10| to typewriting under my direction, and the foregoing
|00105-11| pages is a true and correct transcript of said
|00105-12| testimony.
|00105-13| GIVEN under my hand and official seal
|00105-14| of office this the ____ day of _____, 1987.
|00105-15|
|00105-16| _____
|00105-17| Jerri Trousdale
|00105-18| Certified Shorthand Reporter
|00105-19| in and for the State of Texas
|00105-20| Certificaiton Number: 3057
|00105-21| Date of Expiration: 12-31-88
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